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TREATISE

ON THE

CRIMINAL LAW

OF CANADA.

SECOND EDITION.

BY

SAMUEL ROBINSON ~~CLARKE~~, Esq.,

AND

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OF OSGOODE HALL, BARRISTERS-AT-LAW.

TORONTO:

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1882.

**Entered according to Act of the Parliament of Canada in the year of Our
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SAMUEL ROBINSON CLARKE,
in the office of the Minister of Agriculture.**

P R E F A C E
TO THE
S E C O N D E D I T I O N.

The favor with which the former edition of the **CRIMINAL LAW** was received by the profession has induced the authors to venture on a new edition.

They have condensed the work somewhat, and have embodied in it both the decisions of the various provinces of the Dominion and those contained in the **English Law Reports** down to the end of the year 1881.

A collection of the cases determined in our criminal courts cannot but be useful under a system of government like our own, whose aim is the substitution of one criminal jurisprudence and procedure for the somewhat diverse systems obtaining in the different provinces at the time of confederation. Should this work to any extent aid in this consolidation, the aim of the authors will be accomplished.

S. R. C.
H. P. S.

OSGOODE HALL, TORONTO,
March 1st, 1882.

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THE CRIMINAL LAW

OF

CANADA.

INTRODUCTORY CHAPTER.

THE ENGLISH CRIMINAL LAWS PREVAILING IN THE DOMINION.

Colonies may be acquired either by occupancy, conquest or cession ; the laws prevailing therein depending on the mode of acquisition.

Where the acquisition is by occupancy, all English laws applicable and necessary to the state and condition of the colony are immediately in force, such as the general rules of inheritance, and of protection from personal wrongs ; but other provisions, applicable and peculiar to a people in a more advanced state of civilization and artificial refinement, are neither necessary nor convenient in a new and undeveloped country, and therefore are not in force. (a)

In conquered colonies, the laws existing at the time of the conquest, except such as are contrary to the laws of God, remain in force until altered by the conquering power ; it being competent to the latter to impose on the subjugated people such laws, imperial or otherwise, as may be thought fit. (b)

In ceded colonies the same general law prevails as in conquered colonies, except in so far as the power of the Crown may be modified by the treaty of cession.

(a) *Uniacke v. Dickson*, 1 James, 300, per *Hill, J.*, confirmed by *Smyth v. McDonald*, 1 Oldright, 274 ; *Doe dem Anderson v. Todd*, 2 U. C. Q. B. 84, per *Robinson, C. J.*

(b) *Doe dem Anderson v. Todd*, 2 U. C. Q. B. 82.

The Provinces of Ontario, Quebec, Nova Scotia, New Brunswick and Manitoba are all colonies of the British Empire, but it is not perfectly clear under what modes of acquisition they can severally be classed. The country was originally discovered and to some extent settled by the French, who claimed the whole territory, from the Gulf of St. Lawrence to the then unknown western wilds. By the Treaty of Utrecht, signed in 1713, the present Provinces of Nova Scotia and New Brunswick, then called Acadia, were ceded to Great Britain; and by the Treaty of Paris, concluded in 1763, the entire territories claimed by the French, including the present Provinces of Ontario, Quebec and Manitoba, became the property of the Imperial Crown.

As to the Provinces of Ontario, Quebec and Manitoba, there seems little doubt but that their acquisition may be ascribed to cession founded on conquest; but as to Nova Scotia, it seems to have been considered as a settled colony, in other words, as acquired by occupancy, (c) a view which is strongly supported by the fact that the laws of England, both civil and criminal, with certain limitations and restrictions, prevail therein, although never introduced by Imperial statute or proclamation. If this be correct, New Brunswick would fall within the same class, as, until 1784, it and Nova Scotia formed but one Province.

The criminal law in the Provinces of Ontario and Quebec has been introduced by statute. By the Royal Proclamation of 1763, the criminal law of England was made applicable to the Province of Quebec, as there defined; and by the Imperial statute, 14 Geo. III., c. 83, it was extended to the whole of the present Provinces of Ontario and Quebec. This statute, which took effect 1st May, 1775, after reciting the benefits resulting from the use of the criminal law since its introduction by the proclamation above referred to, enacted that the same should continue to be administered and observed as law, "as well in the description and quality of the offence

(c) *Uniacke v. Dickson*, 1 James, 287.

as in the method of prosecution and trial, and the punishments and forfeitures thereby inflicted." In Ontario, however, the 40 Geo. III., c. 1, was subsequently passed, introducing the criminal law of England, as it stood on the 17th day of September, 1792, "and as the same has since been repealed, altered, varied, modified or affected by any Act of the Imperial Parliament having force of law in Upper Canada, or by any Act of the Parliament of the late Province of Upper Canada, or of the Province of Canada, still having force of law, or by the Consolidated Statutes relating to Upper Canada, exclusively, or to the Province of Canada."

With regard to the Province of Manitoba, prior to Confederation, several Imperial statutes were passed, making provision for the trial of offenders. This legislation was comprised in three enactments, the 43 Geo. III., c. 138, the 1 & 2 Geo. IV., c. 66, and the 22 & 23 Vic., c. 26, the provisions of which it is unnecessary to give, as all necessity for recourse to them is obviated by subsequent colonial legislation.

By an Order in Council following the 33 Vic., c. 3, the Province of Manitoba was formed out of the territories referred to in the above statutes, and by a statute of the Parliament of Canada (34 Vic., c. 14), the entire body of the modern criminal law of England, as existing in the rest of the Dominion, has been extended to that Province. (*d*) Under the latter statute, the Imperial enactments have been superseded as to Manitoba, and the justices in that Province have the same power and jurisdiction over persons charged with indictable offences committed therein, as justices in other parts of the Dominion have over persons committing offences within their several jurisdictions; and the court known as the General Court has power to hear, try and determine, in due course of law, all treasons, felonies and indictable offences committed in any part of the said Province, or in the territory which has now become the said Province. (*e*) The Dominion Statute, 37 Vic.,

(*d*) See charge of Mr. Justice *Johnson* to the Grand Jury, Spring Assizes, 1871.

(*e*) 34 Vic., c. 14, s. 2.

c. 39, moreover, extends to that Province certain Acts relating to the prompt administration of justice in criminal matters, which had been excepted from the operation of the 34 Vic., c. 14.

With regard to British Columbia, the 37 Vic., c. 42, extends to that Province certain of the criminal laws now in force in the other Provinces of the Dominion ; and section 5 grants to the Supreme Court of British Columbia power to hear, try and determine all treasons, felonies, and misdemeanors committed in any part of the Province.

By the British North America Act, 1867, the Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, were federally united into one Dominion, under the British Crown (Manitoba, British Columbia, and Prince Edward Island, having been subsequently admitted), with a constitution, to a great extent a written one, and similar in principle to that of England. Power is given to the Queen, by and with the consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, save in so far as jurisdiction over certain matters is expressly given to the local legislatures of the several Provinces. (*f*) The right to legislate as to the criminal law, including the procedure in relation thereto, is vested in the Dominion Parliament, to the exclusion of the local houses. (*g*) Where, under the terms of this Act, the power of legislation is granted to be exercised exclusively by one body, the subject, so exclusively assigned, is as completely taken from the others as if they had been expressly forbidden to act on it, and if they do legislate beyond their powers, or in defiance of the restrictions placed upon them, their enactments are no more binding than rules or regulations promulgated by any other unauthorized body. (*h*) When, however, the local legislatures have power to legislate on any particular subject, their Acts with reference to the

(*f*) *Fredericton v. The Queen*, 3 S. C. R. 505.

(*g*) *Reg. v. Bradshaw*, 38 U. C. Q. B. 564 ; in *re Hamilton and N. W. Ry. Co.*, 39 U. C. Q. B. 93.

(*h*) *Reg. v. Chandler*, 1 Hannay, 548, per *Ritchie*, C. J.

same are supreme as to the courts and people of the Province, and cannot be objected to as contrary to reason or justice ; (i) and in such case they may have power to make any violation of their provisions in relation thereto a crime even in the technical sense of the term, and to enforce observance by the imposition of punishment, by way of fine or imprisonment. (j) Thus it was held that under section 92 of the British North America Act, Nos. 9 and 16, the Local Legislature not only had the power, but the exclusive right to legislate in relation to shop, tavern, and other licenses, in order to raise a revenue, and that, having such right, they had also power under No. 15 to enact that any person who, having violated any of the provisions of the Act, should compromise the offence, and any person who should be a party to such compromise, should, on conviction, be imprisoned in the common gaol for three months, and that such enactment was not opposed to section 91, No. 27, by which the power to legislate with reference to criminal law is assigned exclusively to the Dominion Parliament. (k) But the punishment imposed by the local legislatures cannot be cumulative. It must be either fine, penalty, *or* imprisonment, not both fine and imprisonment. (l) And it has been doubted whether they have power to authorize imprisonment at hard labor. (m)

The criminal jurisdiction, then, in this country rests entirely with the Dominion Parliament, saving in so far as the power to erect acts or omissions into crimes is given to the local legislatures as incident to their right of legislation in civil matters, and as a means of enforcing their enactments ; and saving, also, in so far as the Imperial Parliament may see fit at any time to interfere in colonial affairs, which it is perfectly competent to them to do, (n) but which is little

(i) *Re Goodhue*, 19 U. C. Chy. 366. See also *Toronto & L. Huron Ry. Co. v. Crookshank*, 4 U. C. Q. B. 318.

(j) *Reg. v. Boardman*, 30 U. C. Q. B. 555-6, per *Richards*, C. J.

(k) *Ibid.*

(l) *Ex parte Papin*, 8 C. L. J. N. S. 122.

(m) *Reg. v. Black*, 48 U. C. Q. B. 192.

(n) *Smith v. McGowan*, 11 U. C. Q. B. 399 ; *Gabriel v. Derbishire*, 1 U. C. C. P. 422.

to be apprehended except with reference to foreign relations. (o)

It remains to be considered what Imperial statutes have been held to have been introduced into the various Provinces of the Dominion and the principle of their adoption, premising that the 40 Geo. III., c. 1, did not introduce the English law into the Province of Ontario to any other or greater extent than the 14 Geo. III., c. 83, had into the Province of Quebec; and that as to the extent of introduction, there is no material difference between those colonies of the Dominion in which it is held to be in force on common law principles and those in which it is so by an express statute or proclamation.

There is no precise or defined rule, nor any direct decision as to what Imperial statutes extend to the colonies. This must of necessity be left open for decision in each particular colony and case by the courts, the ultimate forum being the Privy Council. (p)

English statutes of general and universal application, regulating the ordinary affairs of life, apply to the colonies, and in some cases where an act is only impliedly made an offence in England. (q) And an Imperial Act, though in force generally for the reason just stated, may be held inapplicable in cases of a special nature, where the peculiar condition of the country would render its enforcement inconvenient. (r) In applying these rules, however, it is to be borne in mind, that in the early settlement of a colony, when the local legislature has been just called into existence, and has its attention engrossed by the immediate wants of the members of the infant community in their new situation, the courts of judicature would look naturally for guidance, in deciding upon the claims of litigants, to the general laws of the Mother Country, and would exercise greater latitude in the

(o) *Reg. v. Schram*, 14 U. C. C. P. 322.

(p) *Uniacke v. Dickson*, 1 James, 299, per *Hill, J.*; *ex parte Rousse*, S. L. C. A. 322, per *Sewell, C. J.*; *Dillingham v. Wilson*, 6 U. C. Q. B. O. S. 86, per *Sherwood, J.*

(q) *Cronyn v. Widder*, 16 U. C. Q. B. 361, per *Robinson, C. J.*

(r) *Reg. v. McCormack*, 18 U. C. Q. B. 131.

adoption of them than they would be entitled to do as their local legislature, in the gradual development of its powers, assumed its proper position. And increasing lapse of time should render the courts more cautious in recognizing English statutes which have not been previously introduced. (s) It is suggested as even worthy of grave consideration whether, after the existence of an independent legislature for nearly a century, the adoption of Imperial enactments is not rather the province of the legislature than of the courts. (t)

If, after the grant of a constitution and independent powers of legislation, an English statute is introduced into a colony, though afterwards repealed in England, it will still continue to apply in the colony ; because the provisions of the repealing statute, which are substituted for the repealed statute, extend not to the colony. (u)

There seems to be a distinction between the common and statute law extending to the colonies. As a code colonists have been disposed to adopt the whole of the former, with the exception of such parts only as are obviously inconsistent with their new situation ; whilst far from being inclined to adopt the whole body of the statute law, they hold that such parts only are in force as are obviously applicable and necessary for them. As respects the common law, adoption forms the rule ; as regards the statute law, the exception. (v)

In conclusion, we will give the more important English criminal statutes which have been held to be in force in this country, stating as far as possible the reasons for their adoption.

Notwithstanding the 19 Vic., c. 49, passed in this Province, the 12 Geo. II., c. 28, as to lotteries, is in force here ; first, because it comes within our adoption of the criminal

(s) *Uniacke v. Dickson*, 1 James, 287, per *Haliburton*, C. J.

(t) *Ibid.*

(u) *Kerr v. Burns*, 4 Allen, 609 ; following *James v. McLean*, 3 Allen, 164.

(v) *Uniacke v. Dickson*, 1 James, 289, per *Haliburton*, C. J.

law of England as it stood in 1792, and next, because this statute and other statutes of the same nature, and resting on the same footing, have been treated in our courts as being in force. (*w*)

The statute 32 Henry VIII., c. 9, which prohibits the buying of disputed titles, is in force in Ontario, as it constitutes part of the criminal law of England adopted by the 40 Geo. III., c. 1. (*x*) In the case of *Shea v. Choat*, (*y*) it was held that the statute 5 Eliz., c. 4, is not in force in Ontario, but the statute 20 Geo. II., c. 19, is, though both statutes are of a date long anterior to the introduction of the English law in this Province. In giving judgment in this case, the learned Chief Justice *Robinson* says in reference to the 5 Eliz., c. 4, that "it cannot possibly admit of doubt that its provisions are inapplicable to any state of things that ever existed here. A clause here and there might be carried into effect in this colony, or anywhere, from the general nature of their provisions, but that is not sufficient to make such a statute part of our law, when the main object and tenor of it is wholly foreign to the nature of our institutions, and is therefore incapable of being carried substantially and as a whole into execution." (*z*)

The 28 Geo. III., c. 49, s. 1, as to perjury, is local in its character, and therefore is not in force here. (*a*)

In *Reg. v. Mercer* (*b*) it was held that the 5 & 6 Edw. VI., c. 16, against buying and selling offices, is in force in this country, under the 40 Geo. III., c. 1, as part of the criminal

(*w*) *Uniacke v. Di kson*, 1 James, 356-361 : see also as to lotteries and the 12 Geo. II., c. 28 ; *Corby v. McDaniel*, 16 U. C. Q. B. 378 ; *Marshall v. Platt*, 8 U. C. C. P. 189 ; *Lloyd v. Clark*, 11 U. C. C. P. 250, per *Draper*, C. J. ; *Mewburn v. Street*, 21 U. C. Q. B. 306.

(*x*) *Beasley q. t. v. Cahill*, 2 U. C. Q. B. 320 ; see also *Baldwin q. t. v. Henderson*, 3 U. C. Q. B. 287 ; *Benns q. t. v. Eddie*, 2 U. C. Q. B. 286 ; *Aubrey, q. t. v. Smith*, 7 U. C. Q. B. 213 ; *May, q. t. v. Dettrick*, 5 U. C. Q. B. O. S. 77 ; *Ross, q. t. v. Meyers*, 9 U. C. Q. B. 284 ; *McKenzie v. Miller*, 6 U. C. Q. B. O. S. 459 ; *Smith v. Hall*, 25 U. C. Q. B. 554.

(*y*) 2 U. C. Q. B. 211.

(*z*) *Ibid.* 221.

(*a*) *Reg. v. Row*, 14 U. C. C. P. 307.

(*b*) 17 U. C. Q. B. 602.

law of England. The 49 Geo. III., c. 126, applies here, and expressly extends the 5 & 6 Edw. VI., c. 16, to the colonies, or at least such of its provisions as are in their nature applicable. (c) Probably the 3 Edw. I., c. 26, is in force here. (d)

The 1 W. & M., c. 18, s. 18, is in force here, notwithstanding the Con. Stats. Can., c. 92, s. 18, and a person offending against the former statute may be punished. (e)

The 32 Geo. III., c. 1, introducing the law of England as to property and civil rights into the Province of Ontario, included the law generally which related to marriage, that is, the common and statute law of England applicable to the state of things existing in this colony at the time the Act was passed. The stat. 26 Geo. II., c. 33, being in force in England when our stat. 32 Geo. III., c. 1, became law, was adopted, as well as other statutes, so far as it consisted with our civil institutions, being part of the law of England at that time "relating to civil rights." It would seem, however, that the 11th clause of 26 Geo. II., c. 33, is not in force in this country. (f)

The 8 Henry VI., c. 9, 6 Henry VIII., c. 9, 8 Henry IV., c. 9, and 21 James I., c. 15, as to forcible entry, are in force here; (g) so the 8 & 9 Wm. III., c. 27; (h) so the 33 Henry VIII., c. 20; (i) so the Mutiny Act, 25 Vic., c. 5, s. 72; (j) so by the 14 Geo. III., c. 83, the 9 Geo. I., c. 19, and 6 Geo. II., c. 35, which impose certain penalties on persons selling foreign lottery tickets, have been made to form part of the law of Quebec. (k)

(c) *Reg. v. Mercer*, 17 U. C. Q. B. 602; see also *Reg. v. Moodie*, 20 U. C. Q. B. 389; *Foott v. Bullock*, 4 U. C. Q. B. 480.

(d) *Askin v. London District Council*, 1 U. C. Q. B. 292.

(e) *Reid v. Inglis*, 12 U. C. C. P. 195, per *Draper*, C. J.

(f) *Reg. v. Roblin*, 21 U. C. Q. B. 352-5; *Hodgins v. McNeil*, 9 Grant, 305; 9 U. C. L. J. 125; *Reg. v. Secker*, 14 U. C. Q. B. 604; but see *Reg. v. Bell*, 15 U. C. Q. B. 287.

(g) *Boulton v. Fitzgerald*, 1 U. C. Q. B. 343; *Rex. v. McKreavy*, 5 U. C. Q. B. O. S. 625.

(h) *Wragg v. Jarvis*, 4 U. C. Q. B. O. S. 317.

(i) *Doe dem Gillespie v. Wizon*, 5 U. C. Q. B. 132.

(j) *Reg. v. Dawes*, 22 U. C. Q. B. 333.

(k) *Ex parte Rousse*, S. L. C. A. 321.

The 21 Geo. III, c. 49, prohibiting amusements and entertainments on the Lord's Day has been held to be in force in Ontario, though the propriety of the decision may be questioned. (l)

EXTRADITION.

For the purposes of this chapter, it may be said that where, upon a requisition by the Government of Canada or the United States, a person found within the territories of either nation, charged with murder, assault with intent to commit murder, piracy, arson, robbery, the utterance of forged paper, or forgery committed within the jurisdiction of the other, is delivered up to justice, pursuant to the Ashburton Treaty, and the statutes passed to give effect thereto, the surrender under such circumstances is called *extradition*.

Jurists are not unanimous on the question whether in the absence of treaty stipulations there is any obligation recognized between nations to make such surrender. But the better opinion seems to be that, in an international point of view, the extradition of criminals is a matter of comity, and not of right, except in cases specially provided for by treaty. (m) The law of England does not recognize it as an inter-

(l) *Reg. v. Barnes*, 45 U. C. Q. B. 276.

See further on the general subject *Hesketh v. Ward*, 17 U. C. C. P. 667; *Mercer v. Hewston*, 9 U. C. C. P. 349; *Heartly v. Hearn*, 6 U. C. Q. B. O. S. 452; *Torrance v. Smith*, 3 U. C. C. P. 411; *James v. McLean*, 3 Allen, 164; *Marks v. Gilmour*, 3 Allen, 170; *ex parte Bustin*, 2 Allen, 211; *Fish v. Doyle*, Draper, 328; *Purdy q. t. v. Ryder*, Taylor, 236; *Reg. v. Street*, 1 Kerr, 373; *Doe dem Allen v. Murray*, 2 Kerr, 359; *Milner v. Gilbert*, 3 Kerr, 617; *Morrison v. McAlpine*, 2 Kerr, 36; *ex parte Ritchie*, 2 Kerr, 75; *Reg. v. McCormick*, 18 U. C. Q. B. 131; *Pringle v. Allan*, 18 U. C. Q. B. 575; *Warner v. Fyson*, 2 L. C. J. 105; *Reg. v. Beveridge*, 1 Kerr, 58; *Attorney-General v. Warner*, 7 U. C. C. Q. B. 399; *Lyons in re*, 6 U. C. Q. B. O. S. 627; *Hallock v. Wilson*, 7 U. C. C. P. 28; *Davidson v. Boomer*, 15 U. C. Chy. 1, 218; *Hambly v. Fuller*, 22 U. C. C. P. 141; *Maulson v. Commercial Bank*, 2 U. C. Q. B. 338; *Stark v. Ford*, 11 U. C. Q. B. 363; *Hearle v. Ross*, 15 U. C. Q. B. 259; *Reg. v. Wells*, 17 U. C. Q. B. 545; *Andrew v. White*, 18 U. C. Q. B. 170; *Reg. v. Slavin*, 17 U. C. C. P. 205; *Thompson v. Bennett*, 22 U. C. C. P. 393; *Gordon v. Fuller*, 5 U. C. Q. B. O. S. 174; *Gaston v. Wald*, 19 U. C. Q. B. 586; *Stinson v. Pennock*, 14 U. C. Chy. 604; *Georgian Bay Transportation Co. v. Fisher*, 27 U. C. Chy. 346.

(m) *Re Anderson*, 11 U. C. C. P. 61, per *Richards, J.*; *Reg. v. Young*; 9 L. C. J. 44, per *Badgley, J.*

national duty in the absence of treaty stipulations, and the *Habeas Corpus* Act, 31 Car. II., c. 2, s. 12, in effect prohibits it in the case of subjects, except fugitives from one part of Her Majesty's dominions to another. (n)

As the same views were maintained by the United States, the necessity for a treaty on the subject between that nation and Great Britain was soon felt. Accordingly on the 19th of November, 1794, Jay's Treaty, which, however, extended only to murder and felony, was entered into. It continued in force till the outbreak of the American war in 1812, when its operation ceased, and from the conclusion of the treaty of peace between Great Britain and the United States until the passing of the 3 Wm. IV., c. 6, in 1833, the extradition of criminals between the two countries rested entirely upon state authority and the general law of nations. (o)

The first case in which the subject of extradition was discussed in this country was *Re Fisher*, (p) decided in 1827. Jay's Treaty not then being in force in Quebec, the decision proceeded on the general principles of international law. The court held that the Executive Government had power to deliver up to a foreign state a fugitive from justice charged with having committed any crime within its jurisdiction. In another case, in 1833, Lord Aylmer, then Governor of Canada, refused to deliver up four prisoners for extradition, saying the executive could not, in the absence of treaty or legislation on the subject, dispense with the *Habeas Corpus* Act; but in the same year this defect was remedied in Ontario by passing the 3 Wm. IV., c. 6, Con. Stat., U. C., c. 96.

The extradition of criminals between the United States and Canada is now regulated by the Ashburton Treaty or Treaty of Washington, and the statutes passed to give effect thereto. The treaty, which was passed for purely national purposes, (q) was signed at Washington on the 9th of August,

(n) *Reg. v. Tubbee*, 1 U. C. P. R. 102-3, per *Macaulay*, C. J.

(o) See judgment of *Macaulay*, C. J. *Reg. v. Tubbee*, 1 U. C. P. R. 100-1.

(p) S. L. C. A. 245.

(q) *Reg. v. Young, the St. Alban's Raid*, 167, per *Smith*, J.

1842, by Lord Ashburton on behalf of Great Britain, and Daniel Webster on behalf of the United States. The ratifications were exchanged at London on the 30th of October following.

Immediately on its ratification, the necessity of legislation for the purpose of carrying its provisions into complete effect, was felt by each of the high contracting parties. The English legislature, on the 22nd August, 1843, passed the 6 & 7 Vic., c. 76, entitled "An Act for giving effect to a Treaty between Her Majesty and the United States of America, for the apprehension of certain offenders."

The 5th section of that statute gave the Parliament of this country supreme authority to enact laws, and effectually carry out the provisions of the treaty within the limits of our territory. (r) But colonial legislative action was allowed only for the purpose of carrying into effect the objects of the Imperial Act within the colonial jurisdiction, according to the local circumstances and position of each colony and dependency.

This delegated power of local legislation was therefore absolute in its nature, but restricted in its purport and extent by the objects of the Imperial Act. These objects once secured by the local law, the procedure, or, in other words, the machinery for obtaining its required purposes, was left to the discretion of the local legislature, to be provided for according to the circumstances and position of each colony; (s) and the procedure under the treaty may be changed by our legislature. (t)

In pursuance of the powers thus conferred, provision was afterwards made by our legislature for giving effect to the treaty by the enactment of the 12 Vic., c. 19, (u) upon the passage of which, the operation of the Imperial Statute 6 & 7 Vic., c. 76, was suspended by Order in Council, dated the

(r) *Reg. v. Young*, 9 L. C. J. 38, per *Smith*, J.

(s) *Ibid.* 45, per *Badgley*, J.

(t) *Ibid.*

(u) *Con. Stat. Can.*, c. 89.

28th of March, 1850, and the suspension directed to continue so long as our substituted enactment should remain in force. This statute, after reciting certain inconveniences which had arisen from the English Act, in effect enacted sections 2, 3, and 4 of the latter, with this addition, that section 2 of our Act sanctioned a requisition from the United States, or "any of such States."

No further change was made until the passing of the 23 Vic., c. 41, in 1860, which repealed the Con. Stats. U. C., c. 96. In 1861, the 24 Vic., c. 6, was passed. This Act did not require the Queen's proclamation, or an order of Her Majesty in Privy Council, to give it effect, but had the force of law here without either. (v) The statute was passed in consequence of the legal complications arising in the *Anderson case*. (w) In order to avoid, if possible, the blunders of ignorant and incompetent magistrates, the Act deprived ordinary justices of the peace of the power to deal with extradition offences, and vested it only in superior officers of the courts, such as judges of the superior or county courts, recorders, police or stipendiary magistrates. It repealed the 1st, 2nd, and 3rd sections of the Con. Stat. Can., c. 89, and substituted other provisions in lieu thereof. These substituted sections applied only to the technical procedure of the local law, by giving practical, improved, and additional facilities for carrying out the law, and in this respect were simply verbal amendments *in eodem sensu* of the previously existing enactments. (x) The Act has omitted the words "any such States," which in the prior Acts were superfluous, and their omission in this Act renders it more perfectly conformable with the terms of the treaty and of the Imperial Act, and with the delegated power of legislation by the colonial legislature; (y) for by the terms of the treaty and the Imperial Act, "jurisdiction" and "territories" are synony-

(v) *Reg. v. Young*, 9 L. C. J. 29.

(w) 20 U. C. Q. B. 124.

(x) *Reg. v. Young*, 9 L. C. J. 48, per *Badgley*, J.

(y) *Ibid.* 49, per *Badgley*, J.

mous, and the addition of the words "or of any such States" would be useless, as being, in fact, included in the general aggregate expression "United States of America." (z)

These words are not in the Imperial Act, and it seems our legislature exceeded its authority in introducing them into the 12 Vic., c. 19. The mistake probably arose from a desire more fully to explain that the word jurisdiction used in the treaty was to extend over the several States in the same sense in which it was used when applied to the United States. (a) In this case it was strongly contended that these words were necessary in the statute—that the jurisdiction of the United States, and that of the several States, are separate and independent of each other, and that the omission of these words necessarily and intentionally restricted the operation of the Ashburton Treaty to offences committed solely within the jurisdiction of the United States, and that when the offence was committed within the limits of any one of the States, it was not covered by the treaty. The court, in holding as already shown, declared that the surrender of persons for imputed crimes can only be made by the supreme executive authority of independent nations, and that in the United States it existed in the supreme federal legislature of the nation, and thus, as the object of the treaty could only be attained by the national power, it did not reside in any one of the United States. (b)

The Act also makes two alterations in the rules of procedure. The evidence produced before the magistrate was not to be "sufficient to sustain the charge according to the laws of this Province," but "such as, according to the laws of this Province, would justify the apprehension and committal for trial of the person accused," etc. The language of Robinson, C. J., in the *Anderson case*, (c) shows that, according to the proper construction of the treaty, the former

(z) *Reg. v. Young*, 9 L. C. J. 51, per *Badgley*, J.

(a) *Reg. v. Young, the St. Alban's Raid*, 169, per *Smith*, J.

(b) *Ibid.* 167-9, per *Smith*, J.

(c) *Re Anderson*, 20 U. C. Q. B. 168, per *Robinson*, C. J.

expression has the same meaning as the latter ; and as the 12 Vic., c. 19, used the former only, probably it was amended so as not to conflict with the treaty in this respect.

The other alteration is in the second clause, and consisted in omitting the words, "*or under the hand of the officer or person having the legal custody thereof.*" (d)

The 31 Vic., c. 94, (e) the next statute on the subject, came into operation on the 8th of August, 1868, and was passed to extend the provisions of the 24 Vic., c. 6, to the whole Dominion. (f) It is in substance the same as that statute which it superseded and repealed, together with the Con. Stat. Can., c. 89. So much of the first section of this Act as is in the words following, that is to say, "or any Police Magistrate or Stipendiary Magistrate in Canada, or any Judge of the Sessions of the Peace in the Province of Quebec, or any Inspector and Superintendent of Police empowered to act as a justice of the peace in the Province of Quebec," was repealed by the 33 Vic., c. 25.

This was the condition of our statute law at the time of the passing of the Imperial Extradition Act, 1870, an enactment that has given to our procedure a degree of uncertainty which it would have been wise to have avoided. The statute, after providing for the practice to be applicable to extradition in general, in sec. 27, enacts that "The Acts specified in the third schedule to this Act" (including the 6 & 7 Vic., c. 76) "are hereby repealed as to the whole of Her Majesty's dominions ; and this Act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act) in the case of the foreign States with which those treaties are made, in the same manner as if an Order in Council referring to such treaties had been made in pursuance of this Act, and

(d) See 31 Vic., c. 94, s. 2.

(e) See Stat. 1869, Reserved Acts.

(f) *Reg. v. Morton*, 19 U. C. C. P. 21, per Wilson, J.

as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this Act." Two cases have arisen for adjudication in this country under the above statute, one in Ontario, (*g*) the other in Quebec, (*h*) in which the section just quoted was held to render the Imperial Act, as modified by our 31 Vic., c. 94, and 33 Vic., c. 25, the governing enactment with regard to extradition of criminals from this country to the United States; and the same statute has also been held to be in force with reference to extradition to France. (*i*) It had been thought that sec. 132 of the B. N. A. Act, delegated to the Dominion Parliament full authority to legislate for Canada with reference to treaties between the Empire and foreign nations, and it was under this impression that our 31 Vic., c. 94, was passed; (*j*) and it might be contended that the Extradition Act, 1870, being general in its terms, and the powers conferred by the B.N.A. Act on our Parliament being special, and an integral part of our constitution, has not the effect of overriding sec. 132 of that enactment, and therefore is not in force in this country. It seems hardly reasonable that the provisions of a statute which affect the constitution of the Empire should be held to be annulled by general words. This point, however, was not taken in either of the cases above cited, and remains undetermined, so that at present the Extradition Act, 1870, must be considered as part of the extradition law of this country. And perhaps the Extradition Act, 1877, (*k*) passed by our Parliament, which by its terms is to come into force provided the operation of the Imperial Extradition Act, 1870, "shall have ceased or been suspended within Canada," might be held to have the effect of obviating the difficulty referred to.

But these cases, though they determine that the Imperial Act is in force in this country, throw but little light upon

(*g*) *Re Williams*, 7 U. C. P. R. 275.

(*h*) *Re Rosenbaum*, 18 L. C. J. 200.

(*i*) *Ex parte Taschmacker*, 6 R. L. 328.

(*j*) See remarks of Ramsay, J., in *Re Rosenbaum*, 18 L. C. J. 200.

(*k*) 40 Vic., c. 25, D.

the manner in which it is to be read in connection with our statute. The apparent object of the British Parliament in passing the Act in question was to repeal the different statutes which had, from time to time, been enacted with reference to extradition, and to introduce a uniform procedure under all treaties then made, or which might thereafter be entered into, and at the same time to save all existing treaties in their full integrity and force. (1) A further provision is made by the section above quoted for cases where, in any British possession any law or ordinance exists with respect to treaties in force at the time of passing the Act.

But for that section the operation of our 31 Vic., c. 94, and 33 Vic., c. 25, would have ceased, as they depended on the Imperial statute, 6 & 7 Vic., c. 76, which the Extradition Act, 1870, repeals. This action of the British Parliament in saving existing colonial legislation, would seem to indicate an intention not to disturb our local procedure; and if this surmise be correct, the proper construction of the several enactments would be to give precedence to our statute in all cases where Imperial and Canadian legislation conflict.

As the statutes already mentioned are the only legislation on the subject in this country, it follows that the Extradition Act, 1870, in its integrity, is the code of procedure in extradition from Canada to all foreign countries other than the United States; and with reference to that country the same statute is in force, but modified by our colonial legislation existing at the time of its passage.

In 1873 the statute 36 & 37 Vic., c. 60, was passed by the Imperial Parliament, amending the Extradition Act, 1870; but none of its provisions require particular mention in this place.

Having discussed the various enactments relating to the extradition of criminals, let us now consider how the treaty and statutes are to be construed and carried out in order to

(1) *Re Bouvier*, 42 L. J. N. S. Q. B. 17.

effect the objects they were designed to accomplish. These were the surrender by each country to the other of fugitives from justice, charged with certain specified crimes ; (m) and thereby to subject parties against whom a charge coming within the treaty and statutes is sustained by evidence of criminality to be put upon trial before the proper tribunal of the country where the offence was committed ; (n) and thus to prevent the failure of justice which would naturally result from offenders in one country seeking refuge in the other, and there being amenable to no punishment : for by the principles of the common law pervading the jurisprudence of both Great Britain and the United States, crimes are unquestionably considered local, and cognizable exclusively within the country where they are committed. (o)

Extradition laws are to be interpreted by the law of nations, in so far as the obligations created by them on the part of one nation to another are concerned ; and the then existing public law of both nations forms an essential part of the national compact which is created by the passage of an extradition treaty. Consequently, on the passing of our Extradition Acts, the public law of Great Britain, as well as the public law of the United States, became incorporated into the national compact. (p)

The words of this treaty should not be held to too narrow a construction ; and if the words used to carry out a design of general utility can properly be construed so as to give effect to and not defeat that design, the larger construction must be adopted. (q) The treaty must be construed in a liberal and just spirit ; not laboring with legal astuteness to find flaws or doubtful meanings in its words, or in those of the legal forms required for carrying it into effect. Its avowed object is to allow each country to bring to trial all prisoners

(m) *Reg. v. Morton*, 19 U. C. C. P. 18, per *Hagarty*, C. J.

(n) *Reg. v. Reno*, 4 U. C. P. R. 299, per *Draper*, C. J. ; the *Chesapeake case*, 44, per *Ritchie*, J.

(o) *Ibid.* 44, per *Ritchie*, J.

(p) *Reg. v. Young, the St. Alban's Raid*, 469, per *Smith*, J.

(q) *Re Warner*, 1 U. C. L. J. N. S. 18, per *Hagarty*, J.

charged with the expressed offences, and it is based on the assumption that each country should be trusted with the trial of offences committed within its own jurisdiction. We are to regard its avowed object in construing its provisions, (r) and should look to it for an indication of what was probably meant by anything that may seem ambiguous in the language of the statutes. (s)

The treaty applies to all persons being subjects of both nations, and as well slaves as freemen. (t) The words of the 31 Vic., c. 94, and of the Extradition Act, 1870, are large enough to embrace all persons, subjects, denizens, or aliens, who have committed the crimes enumerated in the United States and who are found in Canada; and a British subject committing one of the crimes enumerated in the treaty within the jurisdiction of the United States, and afterwards fleeing to Canada, is subject to the provisions of the treaty, and the statutes which provide for the surrender of "all persons" who, being charged, etc. (u) So a person convicted of forgery, or uttering forged paper, in the United States, who escapes to Canada after verdict but before judgment, is liable to be surrendered, although, technically speaking, after judgment or verdict of guilty, a man is incorrectly spoken of as "charged with a crime" in the language of the statute. (v) But political offenders have always been held to be excluded from any obligation of the country in which they take refuge to deliver them up, whether such delivery is claimed to be due under friendly relationship or under treaty, unless, in the latter case, the treaty expressly includes them. (w)

The treaty, in express terms, includes seven different offences, viz., murder, assault with intent to commit murder,

(r) *Re Burley*, 1 U. C. L. J. N. S. 49-50, per *Hagarty*, J. ; and see *Reg. v. Paxton*, 10 L. C. J. 216, per *Drummond*, J.

(s) *Re Anderson*, 20 U. C. Q. B. 160, per *Robinson*, C. J.

(t) *Ibid* 124; 11 U. C. C. P. 1.

(u) *Re Burley*, 1 U. C. L. J. N. S. 34; *Ibid*. 20.

(v) *Re Warner*, 1 U. C. L. J. N. S. 16.

(w) *Reg. v. Young, the St. Alban's Raid*, 470, per *Smith*, J.

piracy, arson, robbery, forgery, and the utterance of forged paper. These offences are not political but social, though the governments of Great Britain and the United States have made national laws for each respectively, thereby giving them a municipal legal character. (x) The stipulations of the treaty, with regard to the definitions of the crimes covered by it, are to be carried out in conformity with the municipal laws of both countries, in so far as they agree. (y)

The governments of these two countries, in making the treaty, were dealing with each other upon the footing that each had at that time recognized laws applicable to the offences enumerated, and that these laws would not, in all cases, be the same in both countries. The agreement to surrender to each other criminals of certain classes was based upon the fact of the persons being criminals by the laws of the country from which they came, provided the evidence of criminality, according to the laws of the place where the fugitive so charged should be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed. (z) In the case in which this principle was enunciated, it was held that, as slavery was tolerated in the United States, and the apprehension of a fugitive slave was authorized by law, such slave could not lawfully resist apprehension in order to gain his freedom, though our law conferred it upon every man, and consequently, that a slave, so resisting, might be guilty of murder, and not necessarily of manslaughter only. (a)

So far as we in Canada are concerned, the treaty and statutes are to be construed according to our laws in regard to the offences comprised within their provisions. In other words, the offence must be one of those enumerated according to our law, and the notions we entertain as to the ingredients necessary to constitute it. (b)

(x) *Reg. v. Young*, 9 L. C. J. 44, per *Badgley*, J.

(y) *Ibid.*, *the St. Alban's Raid*, 469, per *Smith*, J.

(z) *Re Anderson*, 20 U. C. Q. B. 190, per *Burns*, J.

(a) *Ibid.*

(b) *Re Smith*, 4 U. C. P. R. 215.

But our law is not absolutely to govern as to the particular offence in all its ingredients, and in relation to whatever circumstances may have influenced the party in committing it. Before this rule could prevail, there should be a similarity between the law of the State from which the person has fled and that of our country, in all the features and attributes of the particular crime. To some extent it might be reasonable to hold that the law of the two countries should be found to correspond. For example, if it were the law of a State that every intentional killing by a slave of his master, however sudden, should be held to be murder, without regard to any circumstances of provocation, or of any necessity of self-defence against mortal or cruel injury, then a fugitive slave who, according to the evidence, could not be found guilty of murder without applying such a principle to the case, could not legally be surrendered by the treaty. It cannot, however, be held that, because a man could not, in the nature of things, be killed in this country while he was pursuing a slave, because there are not, and by law cannot be, any slaves here, therefore a slave who has fled from a slave State into this country, cannot be given up to justice because he murdered a man in that State who was at the time attempting to arrest him under the authority of the law, in order to take him before a magistrate, with a view to his being sent back to his master.

Under such circumstances, reference should be had to the positive law of the slave State, to the conduct of the party pursuing and the party pursued, to the knowledge of the latter that the purpose for which it was desired to arrest him was not contrary to the law of the country, or to the fact (if it should be so) that there was no apparent necessity to inflict death in order to escape. (c)

There are several decisions in our own courts as to the particular offences covered by the treaty. Among the earliest and most important of these is the *Anderson case*. (d)

(c) *Re Anderson*, 20 U. C. Q. B. 170-1, per *Robinson*, C. J.

(d) *Ibid.* 124.

In that case, A., being a slave in the State of Missouri, belonging to one M., had left his owner's house with the intention of escaping. Being about thirty miles from his home, he met with D., a planter, working in the field with his negroes, who told A. that as he had not a pass he could not allow him to proceed; but that he must remain until after dinner, when he, D., would go with him to the adjoining plantation, where A. had told him that he was going. As they were walking towards D.'s house, A. ran off, and D. ordered his slaves, four in number, to take him. During the pursuit, D., who had only a small stick in his hand, met A., and was about to take hold of him, when A. stabbed him with a knife, and as D. turned and fell, he stabbed him again. D. soon afterwards died of his wounds. By the law of Missouri, any person may apprehend a negro suspected of being a runaway slave, and take him before a justice of the peace. Any slave found more than twenty miles from his home is declared a runaway, and a reward is given to whomsoever shall apprehend and return him to his master. A., having made his escape to this country, was arrested here upon a charge of murder; and the justice before whom he appeared having committed him, he was brought up in the Court of Queen's Bench upon a *habeas corpus*, and the evidence returned upon a *certiorari*. It was contended that as A. acted only in defence of his liberty, and upon a desire to gain his freedom, there was no evidence upon which to found a charge of murder, if the alleged offence had been committed here, and that he could not be demanded under the treaty; but the court held that the prisoner was liable to be surrendered, for his right to resist apprehension must be governed by the law of the place where the offence was committed.

In *Re Beebe* (e) the court held that burglary is not an offence within the meaning of the treaty, or the statutes passed to give effect to the treaty.

(e) 3 U. C. P. R. 273.

A prisoner was arrested in Ontario for having committed in the United States the crime of forgery, by forging, coining, counterfeiting, and making spurious silver coin; but the court held that the offence as above charged does not constitute the crime of forgery within the meaning of the treaty or Act, for it was not forgery according to our law. (f) In *ex parte E. S. Lamirande*, (g) the court held that the making of false entries in the books of a bank does not constitute the crime of forgery according to the law of England or Canada, and the prisoner, therefore, was not liable to be extradited on the requisition of the French authorities under the Imp. statute 6 & 7 Vic., c. 75. But where a prisoner was charged with having forged a resolution of a city council as to the issue of bonds, by altering the amount for which the issue was authorized, and of having forged a bond of the said city, it was held, on an application for his discharge, that the resolution being an essential preliminary to the issue of the bond, and the bond being an instrument which might be the subject of forgery, although not executed in strict accordance with the code of the State in which the bond was issued, there was a *prima facie* case made out against the prisoner, and that he should be remanded. (h)

In *Re Lewis*, (i) where the prisoner was charged with assault with intent to commit murder, in that he had opened a railway switch with intent to cause a collision, whereby two trains did come into collision, causing a severe injury to a person on one of them, it was held that this was not an assault within the treaty.

It seems piracy, as used in the treaty, was intended to apply to piracy in its municipal acceptation, cognizable only by tribunals having jurisdiction either territorially or over the person of the offender. If, however, it signify piracy in its primary and general sense, as an offence against the law

(f) *Re Smith*, 4 U. C. P. R. 215.

(g) 10 L. C. J. 280.

(h) *Reg. v. Hovey*, 8 U. C. P. R. 345.

(i) 6 U. C. P. R. 238.

of nations, it can only come within the operation of the treaty when a pirate, having gone into one or other of the countries, and so made himself amenable to its courts, and after having been there legally charged with the offence, has fled or been subsequently found within the territory of the other. (j)

When an act assumes an international character, and is sanctioned by the aggregate power of a nation claiming to exercise belligerent rights, all private jurisdiction over it, as regards individual responsibility, ceases, and it is beyond the reach of the treaty or the statutes. In such case, reference can only be had to the arbitrament of the sword. And an offence cannot be divested of its international character, by selecting from an act—referable for its approval or censure only to the law of nations—a portion of, or an incident in, such act, and then attempting to subject such portion or such incident to trial by a municipal tribunal; for the whole of the details and incidents which in the aggregate constitute a national or hostile act, must be taken together. (k) In accordance with these principles, it was held that the St. Alban's Raid (the facts of which are given in the report) was a hostile expedition, authorized by a Government entitled to claim belligerent rights, and should be disposed of by international law, founded on the rights of belligerents, and not by a neutral judge. (ii)

This principle was also recognized in *Burley's case*. (jj) In the latter case, the counsel for the defence contended that the act charged was committed by the prisoner while engaged in an act of hostility duly authorized by the Confederate States against the United States; and no doubt, if this had been established, the court would have discharged the prisoner. But it was held that, under the circumstances of the case as shown, as well on the part of the prosecution as of the defence, the accused, who took the property of a non-

(j) *The Chesapeake case*, 44-5.

(k) *Reg. v. Youny, the St. Alban's Raid*, 454, per Smith, J.

(ii) *Ibid.*

(jj) 1 U. C. L. J. N. S. 20 and 34.

combatant citizen, by violence, from his person, was guilty of robbery, and liable to be surrendered under the treaty. The same principle was also very fully recognized in the most important case of the *Chesapeake* in New Brunswick. There evidence was produced to establish an authority from the Government of the Confederate States, as recognized belligerents, for the commission of the acts charged.

An accessory before the fact is liable to extradition, but not an accessory after the fact. (*kk*)

Where the crime comes within the treaty, it is immaterial whether it is, according to the laws of the United States, only a misdemeanor and not a felony; our concern is to deal with these foreign offences in our own country in like manner as if they had been committed here—to enforce the treaty effectually and in good faith, and to leave all questions of municipal law between the foreign authorities and their prisoners to be dealt with and settled by their own system, with which, in that respect, we have nothing whatever to do. (*l*)

Having set out the cases in which the construction of the treaty was involved, the procedure for giving effect thereto will now be considered. This, as before stated, is governed by the Imperial Extradition Act, 1870, as modified by our 31 Vic., c. 94, and 33 Vic., c. 25.

With reference to the warrant of arrest, the 31 Vic., c. 94, sec. 1, as amended by the 33 Vic., c. 25, provides that any Superior or County Court Judge, or any Recorder of a city in Canada, or any Commissioner appointed for the purpose by the Governor under the Great Seal, may issue such warrant. The Extradition Act, 1870, by section 8, gives the same power to “a Police Magistrate or any Justice of the Peace in any part of the United Kingdom,” and in section 17 provides that the Act shall “extend to every British possession in the same manner as if throughout this Act the British possessions were substituted for the United Kingdom or England,

(*kk*) *Reg. v. Browne*, 6 App. 386.

(*l*) *Re Caldwell*, 6 C. L. J. N. S. 227 ; 5 U. C. P. R. 217.

as the case may require," but with certain modifications, which in many respects are inapplicable to Canada. The authority to try extradition cases was formerly vested in police magistrates and justices of the peace, but that authority was expressly taken from them by our legislature, as already stated ; and a difficulty now raised by the above sections of the Imperial Act, is whether they have the effect of re-clothing magistrates and justices with the powers of which they had been stripped.

It has been held in Quebec, on a construction of these sections, (m) that a judge in sessions may take the preliminary *enquête* in matters of extradition, and this apparently on the ground that he is while so acting a justice of the peace. However this may be, the Imperial Act, being permissive in its terms, has not, it is submitted, the effect of ousting the jurisdiction of our superior and county court judges under our 31 Vic., c. 94.

When application is made to a judge or magistrate for a warrant of arrest under the treaty, his first consideration, provided he have jurisdiction in other respects, should be, whether the alleged offence is within its terms. But for the treaty and the statutes, the proceedings by a magistrate, in respect of a crime committed in the United States, by way of arresting or committing the accused to prison, would be *coram non judice*, and upon *habeas corpus* the prisoner would be entitled to his discharge. The whole power to deal with a crime in a foreign country is derived from the treaty and the statutes, and there is no jurisdiction or power to take any proceedings under the treaty, except for one of the offences mentioned therein ; (n) and if the judge or magistrate does not find by his warrant that one of these offences has been committed, the whole case fails, and no legal power exists to correct or supply the defect. (o)

(m) *Re Konigs*, 6 *Revue Legale*, 213, Q. B. 1874.

(n) *Re Anderson*, 11 U. C. C. P. 52-3, per *Draper*, C. J.

(o) *Ibid.* 68, per *Hagarty*, J.

In considering, therefore, the right to arrest and detain, it ought clearly to appear that the prisoner is charged with an offence within the treaty. If doubtful whether it is one of those enumerated or not—if, for instance, it is not clear whether the offence alleged to have been committed amounts to murder or manslaughter—that interpretation should be adopted which is most in favor of the liberty of the accused; and as manslaughter is not mentioned in the treaty, the party should not be arrested and detained. (*p*)

It was held in the *Chesapeake case*, that the magistrate must have jurisdiction, judicially as well as territorially, over the offence, and that if it were of such a character that he would have no jurisdiction over it when committed in this country, neither the treaty nor the statute authorized an inquiry for the purpose of committing the offender, when his offence arose in the United States. This case, however, was under the Imp. Stat. 6 & 7 Vic., c. 76, which only empowered any “justice of the peace or other persons” to act under the treaty. The tendency of recent legislation in Canada has been to vest this power in the superior magistracy of the country; and if it is still held that they must have a judicial as well as territorial jurisdiction over the offence, the jurisdiction is nevertheless very much enlarged; unless, indeed, the Extradition Act, 1870, be held to have the effect of enlarging our statutes in this respect.

The following case, which may still be useful, shows the authority for appointing a magistrate to act under the 31 Vic., c. 94, the powers which the appointment confers, and also that they are not affected by the circumstances that another magistrate has, after hearing evidence, etc., discharged the fugitive:

The prisoners were arrested at Toronto, under a warrant issued by one M., on an information laid by B., charging them with robbery, committed with violence, in one of the

(*p*) *Re Anderson*, 11 U. C. C. P. 62-3, per *Richards*, J.

United States of America, and stating the information to have been laid before "the undersigned police magistrate in and for the county of the city of Toronto, amongst other counties appointed under and by virtue of the Act of the Parliament of Canada, 28 Vic., c. 20, entitled," etc. The warrant of arrest described M. as police magistrate for all these counties, naming them in full, and the warrant of commitment as police magistrate for the county of Essex, amongst other counties appointed under and by virtue of the above Act (but no commission empowering him to act was produced on this application, which was for the prisoners' discharge under a writ of *habeas corpus*). Under this warrant the prisoners were conveyed to S., in the county of Essex, and evidence was given there, before M., of the robbery in question, consisting of certain depositions taken in the United States, before a justice of the peace there, on which an original warrant of arrest was issued by him. These depositions had been taken, and warrant issued, after the arrest at Toronto. On this evidence, the prisoners were committed to custody, to await the warrant of the Governor General for their extradition to the United States. The prisoners, it seemed, had been previously arrested in Toronto on the same charge, and been discharged by the local police magistrate, after a lengthened investigation had before him. It was held that this discharge did not prevent another duly qualified officer from entertaining the charge against them, on the same or on fresh materials, and that the failure of one magistrate, from mistake or otherwise, to commit persons charged for extradition, cannot prevent the action of another. It was held, also, that the 29 & 30 Vic., c. 51, s. 373 (now repealed and re-enacted by (Ont.) 32 Vic., c. 6, s. 11), only applied to any case *arising in any town or city* in Ontario, and did not preclude M. from taking the information of B. and issuing his warrant in Toronto, where there was already a police magistrate; for that the words of the section merely excluded him from jurisdiction there in local

cases, but did not apply to cases arising under the extradition laws.

It was further held, that the appointment of M. might well have been made under 28 Vic., c. 20, for any one or for all the counties of Ontario, including Toronto, and his power made the same as a police magistrate in cities, except as regarded purely municipal matters, and that this Act was continued by (Ont.) 31 Vic., c. 17, s. 4; but that as nothing was suggested in any way impugning the possession by M. of the authority to act, the ordinary rule must prevail, and the warrant be treated as executed by an officer possessing such authority. (q)

Under our statute, the 31 Vic., c. 94, a warrant might be issued in the first instance in this country, and the proceedings under the treaty and statutes initiated here, (r) it not being necessary that an original warrant should have been granted in the United States; but section 10 of the Extradition Act, 1870, seems to require the foreign warrant to be issued at any rate before the commitment of the prisoner.

It is not a condition precedent to the jurisdiction of the magistrate that a requisition should be first made by the Government of the United States upon the Canadian Government, or that the Governor General of Canada should first issue his warrant requiring magistrates to aid in the arrest of the fugitives. (s) If, however, a Secretary of State should order a magistrate to proceed under the statute, his jurisdiction cannot be impeached upon the ground that the terms of the treaty have not been complied with. This might be a reason for the Secretary refusing to make such an order; but having made it, and the magistrate having acted under it, all the court has to do is to look at the statute and see whether he had jurisdiction under it. (t)

(q) *Reg. v. Morton*, 19 U. C. C. P. 9.

(r) *Re Anderson*, 11 U. C. C. P. 53, per *Draper*, C. J.; *Reg. v. Morton*, 19 U. C. C. P. 19, per *Hagarty*, J.; *Re Caldwell*, 6 C. L. J. N. S. 227; 5 U. C. P. R. 217.

(s) *Re Burley*, 1 U. C. L. J. N. S. 34; *Reg. v. Young*, 9 L. C. J. 29; Extradition Act, 1870, sec. 8.

(t) *Re Counhaye*, L. R. 8, Q. B. 416, per *Blackburn*, J.

The judge or magistrate issuing the warrant for the apprehension of the offender, is the person before whom the evidence in support of the charge must afterwards be heard, and who must determine upon its sufficiency ; (u) but his decision is not binding on the governor, and the latter may, notwithstanding, order the prisoner's discharge ; (v) for the magistrate must send or deliver to the governor a copy of all testimony taken before him, that a warrant may issue upon the requisition of the United States for the surrender of the prisoner pursuant to the treaty. (w) Nor is the opinion of the committing magistrate conclusive on the prisoner ; for, if adverse to the latter, he may still apply to the governor, whose decision may possibly be influenced by considerations which a court could not entertain. (x) And it seems doubtful whether it was not the intention of the extradition statutes to transfer to the governor exclusively the consideration of all the evidence, that he might determine whether the prisoner should be delivered up.

It may be observed here, that the surrender of persons for imputed crimes can only be made by the supreme executive authority of independent nations. (y) By the British North America Act, 1867, s. 132, the Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada, or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries. No doubt, the Ashburton Treaty is covered by this clause, and that under it the Governor General has power to deal with extradition cases to the exclusion of the Lieutenant-Governors of the several Provinces.

(u) *The Chesapeake case*, 46 ; *Re Anderson*, 20 U. C. Q. B. 165-9, per Robinson, C. J.

(v) *Ibid.* 189, per Burns, J. ; *Reg. v. Reno and Anderson*, 4 U. C. P. R. 295, per Draper, C. J.

(w) *Re Burley*, 1 U. C. L. J. N. S. 45, per Richards, C. J. ; *Re Anderson*, 20 U. C. Q. B. 165-189 ; see 31 Vic., c. 94, s. 1 ; also Extradition Act, 1870, s. 8.

(x) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 295, per Draper, C. J.

(y) *Reg. v. Young, the St. Alban's Raid*, 167, per Smith, J.

The surrender, also, must be by the Governor General, as representing the Government. (z) But his power is confined within the letter of the local law : and he is powerless to act against fugitives charged with the commission of any other of the formidable list of offences, social and political, not enumerated in the treaty, because these are not contained within the local law. It seems, too, that the courts may, to some extent, control or direct the action of the Executive ; for when a party is committed under a magistrate's warrant, he may apply to any of the superior courts or judges for a *habeas corpus*, and that the court in term, or the judges in vacation, may determine whether the case be within the treaty, and, if not, whether a legal power to surrender the prisoner is, nevertheless, reposed in the Executive Government ; and if so, then whether a case was made out which entitled the Government to grant such surrender. (a) The governor is not authorized to surrender the prisoner until the expiration of fifteen days after his commitment. (b) This provision was probably inserted in the statute to give the prisoner an opportunity of having the magistrate's decision reviewed on *habeas corpus* and *certiorari*.

The fact that the person is charged with piracy committed in the foreign country ought not to prevent the governor from surrendering him on the charge made and proved in this country. But if the charge in this country is robbery, and the requisition on behalf of the government of the foreign country be for his extradition for the crime of piracy, he could not be surrendered under a warrant of commitment for robbery. And if his surrender is demanded for any other offence than the one for which he has been committed, it must be refused. (c)

Looking at the statute, (d) we find that the commitment of the prisoner is to be made upon such evidence as, according

(z) *Reg. v. Tubbee*, 1 U. C. P. R. 98.

(a) *Ibid.*

(b) Extradition Act, 1870, s. 11.

(c) *Re Burley*, 1 U. C. L. J. N. S. 45-6, per *Richards*, C. J.

(d) Extradition Act, 1870, ss. 10 and 17.

to the laws of the Province in which he has been apprehended, would justify his committal for trial, if the crime of which he is accused had been committed therein. This seems to impose on the judge or magistrate the same duties as devolve upon justices of the peace, on charges of indictable offences committed within our own jurisdiction; and when he would commit for trial under a similar state of facts arising in this country, he is bound to commit for trial under the treaty, and our statutes passed to carry it out. (e) The authority of the judge or magistrate does not extend beyond the inquiry indicated by the statute; (f) but he is bound to see that the commitment for extradition is warranted by the statute, and that the offence is sustained by evidence which in our own courts would *prima facie* establish the crime charged. (g) When such *prima facie* case is made out, and the evidence in defence is not clear and conclusive, a jury is the only constitutional tribunal which can determine whether evidence offered to displace the impression which the *prima facie* case is calculated to make, does or does not satisfactorily displace it; and all questions of intent, or of fact or inference, should be submitted to them. (h) The judge or magistrate, therefore, should not go beyond a bare inquiry as to the *prima facie* criminality of the accused, and should not inquire into matters of defence which do not affect such criminality; such, for instance, as whether the prosecution of the offender is barred by a statute of limitations in the foreign country, or whether there is a probability of the ultimate conviction of the prisoner therein. (i) Conflicting or unsatisfactory evidence in answer to a strong *prima facie* case, though perhaps properly receivable, would not justify the magistrate in discharging the prisoner; (j) for it is to be

(e) *Re Burley*, 1 U. C. L. J. N. S. 48, per *Richards*, C. J.

(f) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 281.

(g) *Reg. v. Morton*, 19 U. C. C. P. 25, per *Wilson*, J.; *ex parte Lamirande*, 10 L. C. J. 260.

(h) *Reg. v. Gould*, 20 U. C. C. P. 159, per *Gwynne*, J.; the *Chesapeake case*, 48.

(i) *Ex parte Martin*, 4 C. L. J. N. S. 200, per *Morrison*, J.

(j) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 281.

observed that he cannot try the case here, nor weigh conflicting evidence, nor assume the functions of a jury by deciding as to the credibility of witnesses. (k) In the *Burley* case, the accused, on his examination before the magistrate, admitted the acts charged, which *prima facie* amounted to robbery, and alleged, by way of defence, matter of excuse which was of an equivocal character and bore different interpretations, and the court held that the magistrate could not try the case, nor act on the explanatory evidence by way of defence: but the *prima facie* evidence being sufficient to justify the committal of the prisoner, the facts necessary to rebut the *prima facie* case could only be determined by the courts of the United States.

If there is not sufficient evidence of criminality, the magistrate ought not to commit; if there is, he ought, notwithstanding the evidence is sufficient, if true, to prove an *alibi*. If he discharges because the evidence *pro* and *con.* is equally strong, and he cannot determine which side is telling the truth, he is in error, because, in either of these cases, if he pursued any other course, he would, for many purposes, be assuming the functions of a jury, and, on a preliminary investigation, trying the whole merits of the case, though the inquiry was only instituted to ascertain whether the evidence of criminality would justify the apprehension and committal for trial of the person accused. (l)

If the facts proved admit of different interpretations as to the intent with which the prisoner acted, this is no ground for refusing to commit for extradition, because the question of intent is for the jury on the trial. (m) Thus, if the charge is of assault with intent to commit murder, it is no objection that the facts proved are as much evidence of other felonious

(k) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 281; *Re Burley*, 1 U. C. L. J. N. S. 34; *Reg. v. Young, the St. Alban's Raid*, 449, per Smith, J.; *ex parte Martin*, 4 C. L. J. N. S. 200, per Morrison, J.

(l) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 299, per Draper, C. J.; *Re Burley*, 1 U. C. L. J. N. S. 46, per Richards, C. J.

(m) *The Chesapeake case*, 48.

intents as of the intent to murder. (*n*) And if the evidence presents several views, on any one of which there may be a conviction, if adopted by the jury, the court is not called upon to determine which of the views is best supported, but may commit the prisoner for surrender. (*o*)

The magistrate should remember that the citizens of a foreign country are entitled to precisely the same measure of justice as our own people. (*p*) But he should not hesitate in committing the prisoner for extradition from any fear that he will not be fairly dealt with in the United States ; and, even if he is satisfied that the prisoner will not be tried fairly and without prejudice in the foreign country, he cannot refuse to give effect to the statute by acting on such an assumption. (*q*) But he must assume that courts in other countries will be governed by the same general principles of justice which prevail in our own courts, and that the prisoner will have a fair trial after his surrender. (*r*) We are not to overlook or forget for an instant that we are dealing with a highly civilized people, most tenacious of their liberty, whose laws are similar to our own, but administered with more of the common law technicality than we have thought it expedient to retain, by which many avenues are left open for criminals to escape which we have closed ; (*s*) so that a prisoner is more likely to be acquitted in the United States than here.

An information stating that the prisoner was apprehended "on suspicion of felony" was held too general, as not containing a charge of any specific offence. (*t*) The information in this case was considered as for an ordinary offence, committed within our own jurisdiction. But it is no objection

(*n*) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 296, per *Draper*, C. J.

(*o*) *Reg. v. Gould*, 20 U. C. C. P. 154.

(*p*) *Re Kermott*, 1 Chr. Reps. 256, per *Sullivan*, J.

(*q*) *Re Anderson*, 20 U. C. Q. B. 173, per *Robinson*, C. J.

(*r*) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 299, per *Draper*, C. J. ; *Re Burley*, 1 U. C. L. J. N. S. 48, per *Richards*, C. J.

(*s*) *Reg. v. Morton*, 19 U. C. C. P. 25, per *Wilson*, J.

(*t*) *Reg. v. Young, the St. Alban's Raid*.

to the information and complaint on which the magistrate issues his warrant for the arrest of the party, in the first instance, that the complainant was not an eye-witness of the facts to which he deposes, or that they are stated on information and belief; at least, the offender may be lawfully brought before a justice, and detained a reasonable time, until the proper evidence can be produced. (u)

In *Re Kermott* (v) a question was raised, whether a committing magistrate could detain a prisoner on evidence amounting only to a ground of suspicion, for the purpose of other evidence being imported into the case, so as to bring it within the treaty; but it was held that neither the treaty nor the statutes contemplate the surrender of an accused person upon mere suspicion. (w) But where a magistrate was in receipt of telegrams from high persons in France and England, informing the police and the Consul of France of the escape of an individual whom they described, and also of an affidavit of the German Consul, stating that he had reason to believe him guilty, it was held that he was justified in detaining him until the arrival of proof. (x) However this may be, there is no doubt of the magistrate's power to detain the prisoner when the evidence is clear and satisfactory as to his guilt, and this even although he has been arrested upon a void warrant. Thus, where a prisoner was committed for extradition, it was held on *habeas corpus* that the material question was, being in custody, whether a sufficient case was made out to justify his commitment for the crime charged; that it was immaterial that the original information, warrant, etc., were irregular and defective, if, on the hearing, sufficient appeared to justify the commitment; that it would be absurd to discharge the prisoner because the warrant might be void when the evidence, on the hearing, would justify re-arresting

(u) *Re Anderson*, 20 U. C. Q. B. 151, per *Robinson*, C. J. ; *Reg. v. Reno and Anderson*, 4 U. C. P. R. 287.

(v) 1 Chr. Rep. 253.

(w) *Ibid.* 258.

(x) *Re Konigs*, 6 R. L. 213, Q. B.

him the next moment, and that the commitment must therefore be upheld. (y)

In *Re Anderson*, (z) it was held that, when a person is brought before the court upon a writ of *habeas corpus*, and the warrant of commitment upon which he is detained appears on its face to be defective, the court before whom the prisoner is brought has no authority to remand him, and that such power is only possessed by the court in virtue of its inherent jurisdiction at common law, and does not extend to proceedings under the Extradition Treaty and statutes. But it has been held in Quebec that a Judge of Sessions, when a prisoner is brought before him on the original warrant of arrest, has power to remand under the treaty and statutes; and when the remand appointed no day for the further examination of the prisoner, and an application was made for a *habeas corpus* (before the eight days after the remand had expired), (a) on this ground, and on the ground that the judge had no power to remand, the writ was refused, the court holding that the power to remand was essential to the performance of the magistrate's duties, and that the irregularity in not fixing the day was unimportant. (b)

The provision in the statutes as to the evidence of criminality being sufficient to justify the apprehension and committal for trial, if the offence had been committed here, merely furnishes a test as to the kind of evidence required. (c) So far as regards the means of proof, there can be no doubt that it is our law which must govern, according to the provision in the statute. If, for instance, the law of the States, or any of them, should admit a confession extorted from a party by violence or threats, to be used against him on a charge of an offence coming within the provisions of the treaty, such evidence could not be admitted here. (d)

(y) *Ex parte Martin*, 4 C. L. J. N. S. 198.

(z) 11 U. C. C. P. 1.

(a) See 32 & 33 Vic., c. 30, s. 41.

(b) *Reg. v. Young, the St. Alban's Raid*, 15.

(c) *Re Warner*, 1 U. C. L. J. N. S. 18, per *Hagarty*, J.

(d) *Re Anderson*, 20 U. C. Q. B. 169, per *Robinson*, C. J.

The judge, or other person acting, may proceed upon original *viva voce* testimony, in like manner as "if the crime had been committed in this Province." He may, however, also receive the original depositions, (e) or duly authenticated copies thereof, on which the original warrant was issued in the United States, in evidence of the criminality of the accused. (f) But as the Extradition Statutes are enabling Acts, there is no obligation on the part of the prosecutor to produce such depositions. (g)

Under the third section of our statute, 31 Vic., c. 94, the depositions that may be received as evidence of the criminality of the prisoner must be those upon which the original warrant was granted in the United States, certified under the hand of the person issuing it, and not depositions taken subsequently to the issue of the warrant, or, not in any way connected therewith. (h) But under the Imperial Extradition Act, 1870, depositions duly authenticated are receivable in evidence, whether they are taken in the particular charge or not, and whether taken in the presence of the accused or not, it being left to the magistrate to give what weight he thinks proper to depositions so taken. (i) And the depositions and statements on oath, and the copies thereof, referred to in the 14th section of the Extradition Act, 1870, are made to include affirmations and copies of such affirmations. (j)

As the statute permits depositions taken in a foreign court to be used in lieu of oral testimony, when the case depends wholly upon such depositions, we must be strict in seeing that they are depositions coming clearly within the meaning and provisions of the section, (k) and that the forms and technicalities of the statute have been strictly complied

(e) *Reg. v. Mathew*, 7 U. C. P. R. 199; *Reg. v. Browne*, 6 App. R. 386.

(f) *Re Caldwell*, 6 C. L. J. N. S. 227; 5 U. C. P. R. 217, per *A. Wilson*, J.

(g) *Ibid.* 227, per *A. Wilson*, J.

(h) *Reg. v. Robinson*, 6 C. L. J. N. S. 98; 5 U. C. P. R. 189; *Reg. v. Browne*, 6 App. R. 386.

(i) *Re Counhaye*, L. R. 8, Q. B. 410.

(j) Extradition Act, 1873, 36 & 37 Vic., c. 60.

(k) *Reg. v. Robinson*, 6 C. L. J. N. S. 99, per *Morrison*, J.

with. (l) An affidavit sworn before a justice of the peace in the United States, not being a copy of any original deposition, properly certified, is not admissible as evidence, nor is the objection cured by the consent of the prisoner's counsel. (m) The evidence of a professional gentleman as to the law of the United States is properly admissible before the magistrate. (n) But where the evidence against a prisoner of having uttered a forged instrument was not otherwise sufficient, the court would not look at an indictment against him found by the grand jury of an American court, (o) and a mere copy of such an instrument is clearly inadmissible. (p)

In the *St. Alban's Raid case*, the examination of the witnesses for the prosecution was conducted in the manner prescribed by the 32 & 33 Vic., c. 30, s. 29 *et seq.*, as to offences committed here. The prisoner was allowed to cross-examine the witnesses, and the depositions certified that he had the opportunity of doing so. The voluntary statement of the prisoner was taken, as by s. 31 of this statute, at the request of the Crown counsel. The judge, however, declined to express an opinion as to its legality. (q)

Previously to the passing of the Extradition Act, 1870, the extent of the magistrate's authority to receive evidence on behalf of the prisoner was not very clearly defined, although the question had been discussed in several important cases. (r)

But by section 9 of that statute it is provided that the magistrate shall "hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed" here; and "shall receive any

(l) *Re Lewis*, 6 U. C. P. R. 236.

(m) *Re Anderson*, 20 U. C. Q. B. 183, per *McLean*, J.

(n) *Ibid.* 172, per *Robinson*, C. J.

(o) *Reg. v. Hovey*, 8 U. C. P. R. 345.

(p) *Re Rosenbaum*, 18 L. C. J. 200; *Reg. v. Browne*, 6 App. R. 386.

(q) See also the *Chesapeake case* on these points.

(r) *Reg. v. Young, the St. Alban's Raid*; the *Chesapeake case*; *Re Burley*, 1 U. C. L. J. N. S. 34.

evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character, or is not an extradition crime."

Under this statute it has been held that the judge or magistrate has no authority to hear the prisoner's defence, but that in the exercise of his discretion he might hear any evidence tendered to show that the offence was of a political character or one not comprised in the treaty, or that the accuser was not to be believed upon oath, or that the demand for the prisoner's extradition was the result of a conspiracy. (s)

In *Re Caldwell*, (t) the court held that the evidence of an accomplice was sufficient to establish the charge for the purpose of extradition, and that magistrates holding preliminary examinations might undoubtedly act on the evidence of an accomplice, as the matter in investigation is merely whether the accused shall be put upon his trial or not; and when all questions as to how far the accomplice is entitled to credit will be duly considered at the proper time. It seems, also, the evidence of a slave may be received. (u)

If the prisoner is committed for surrender on insufficient evidence, a judge in chambers will, on writs of *habeas corpus* and *certiorari*, order his discharge. (v)

It had been held by the Court of Queen's Bench, in England, in the *Anderson case*, (w) after the judges of our courts had refused to discharge the prisoner, that the Imperial courts had jurisdiction to issue a writ of *habeas corpus* into this country to bring up the body of Anderson, and they accordingly granted the writ. This action of the English courts caused much complaint in Canada, as being an unwarranted interference with our judicial prerogatives; and to prevent future proceedings of a like kind, the Imperial Statute 25

(s) *Re Rosenbaum*, 20 L. C. J. 165, Q. B.

(t) 6 C. L. J. N. S. 227; 5 U. C. P. R. 217.

(u) *Re Anderson*, 20 U. C. Q. B. 182, per *McLean*, J.

(v) *Re Kermott*, 1 Chr. Rep. 253.

(w) *Ex parte Anderson*, 3 L. T. Reps. N. S. 622; 7 Jur. N. S. 122.

Vic., c. 20, was passed, which provides that no *habeas corpus* shall issue out of any court in England to any colony or foreign dominion of the Crown in which any courts exist having power to issue and ensure the due execution of writs.

Some doubt was entertained under our 31 Vic., c. 94, whether it was competent for the Superior Courts to interfere in the case of an offender coming clearly within the treaty, after the judge or magistrate who heard the evidence had determined that, in his opinion, it sustained the charge, and had transmitted to the governor a copy of the testimony and committed the prisoner to gaol under the first section of the Act. No provision is made by that statute for granting a writ of *habeas corpus*, except in the case where the prisoner has not been delivered up within two months after his commitment; and although the necessity for a controlling power in the superior courts was strongly felt, grave doubts were expressed by several judges of high authority as to whether any such power existed. (x) But by section 11 of the Extradition Act, 1870, the police magistrate, on committing a prisoner, shall inform him that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*; so that it would seem that under this section, independently of the general question, our superior courts have authority to exercise the same control in extradition matters as they have over magistrates acting in the administration of the ordinary criminal law.

The following case is important as to the sufficiency of the evidence. The express car of a railway train, on one of the roads in the United States of America, was broken into, and plundered by five or more men, two or three of whom fired at the conductor who was endeavoring to stop them as they were moving off with the engine. The conductor was at the

(x) See *Reg. v. Reno and Anderson*, 4 U. C. P. R. 281; *Re Anderson*, 20 U. C. Q. B. 124; *Re Warner*, 1 U. C. L. J. N. S. 16; *Kermott's case*, 1 Chr. Rep. 253; *Tubbee's case*, 1 U. C. P. R. 98; *Re Burley*, 1 U. C. L. J. N. S. 46.

time about eight feet from the person who fired the first shot, and the ball passed through his coat. This person was a brother of Reno, one of the prisoners apprehended. The express messenger swore to the identity of the prisoners, and as to the identity of the person who fired the first shot. The prisoners were arrested in Canada, at the instance of the Express Company, and demanded for extradition by the United States authorities. The prisoners offered evidence on their examination to prove an *alibi*. *Draper*, C. J. (in Chambers), held that, under the circumstances of this case, there was sufficient *prima facie* evidence of the criminality of the prisoners to warrant a refusal to discharge them, and that there was evidence to go to a jury to lead to the conclusion that the intent of the prisoners was, at the time of shooting, to commit murder. (y)

The court above must be fully satisfied there is no legal ground on which the decision of the magistrate can be supported before it is reversed, (z) and it would seem that if in one view of the evidence the court find the decision sustainable, they ought not to interfere and reverse it. (a) Where the prisoner was brought before a judge in General Sessions, on the original warrant of arrest, and remanded before final commitment, the court doubted their power to interfere by *habeas corpus* until final commitment. (b)

The following case bears on the question of return to the writ of *habeas corpus* :

Where, after the prisoners were committed by a justice for extradition, a writ of *habeas corpus*, directed to a gaoler, was sent to the Clerk of the Crown, with a return stating that he held the prisoners under a warrant of committal annexed, but was unable to produce them for want of means to pay their conveyance. This return having been marked by the clerk, "received and filed, 26th September, 1868," and

(y) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 281.

(z) *Reg. v. Gould*, 20 U. C. C. P. 161, per *Hagarty*, J.

(a) *Ibid.*

(b) *Reg. v. Young, the St. Alban's Raid*, 15.

signed by him, a judge in chambers made an order allowing these papers to be withdrawn, for the purpose of having another return made. The prisoners were afterwards produced, with the writ to which the foregoing return was annexed, and another, stating that the prisoners were held under the warrant already spoken of, and a subsequent warrant, by which an alleged defect in the first was intended to be cured. It was held that the first return was, in fact, no return, merely alleging matters of excuse for not making a return, and that, when a writ of *habeas corpus* is returnable before a judge in chambers, the return cannot be filed until it has been read before the judge, and that the second return was the only one in this case, and, it having been openly read, was duly filed. (c) The return might have been amended if necessary. (d)

The commitment authorized by the Extradition Act is peculiar, and should conform to our 31 Vic., c. 94. (e) It is not a commitment for safe custody, in order that the party may be afterwards brought to trial within our jurisdiction, but a commitment for safe custody, there to await the warrant of a Secretary of State for his surrender. (f) For it is not the function of the magistrate to determine whether the prisoner should be extradited, but to remand him and report the facts to the proper executive authority. (g)

The warrant of commitment should follow the terms of the statute, and should use the technical term "murder" (or as the case may be) in describing the offence, for although in ordinary cases, where the crime under investigation has been committed in our own country, the technical precision and accuracy necessary in an indictment is not required in a warrant, yet neither this rule, nor the reason for it, apply to extradition cases. In the latter, there is only a special statu-

(c) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 281.

(d) *Ibid.* 291, per *Draper*, C. J.

(e) *Ex parte Zink*, 6 Q. L. R. 260.

(f) Extradition Act, 1870, s. 10; *ex parte Zink*, *supra*.

(g) *Ex parte Zink*, 6 Q. L. R. 260.

tory jurisdiction conferred on the magistrate, and, therefore, the warrant in the execution of the statutory power, thus limited, should adhere to the terms of the statute, in order that it may appear clearly that the offence is one of those to which the treaty and the statutes directly apply. (h)

In the *Anderson case*, when before the Court of Common Pleas, it was held that a warrant of commitment which used the words, "did wilfully, maliciously, and feloniously stab and kill," and omitted the word "murder," and "with malice aforethought," and concluded by instructing the gaoler to "there safely keep him (the prisoner) until he shall be thence delivered by due course of law," instead of the words of the Act, directing the prisoner to remain in gaol until his surrender, upon the requisition of the proper authority, or until he should be discharged according to law, did not come within the provisions of the treaty or statute, and was consequently defective. (i)

If the warrant has not the proper statutory conclusion, all that appears on its face is, that the prisoner remains in custody for an offence alleged to have been committed by him in a country over which our courts have no jurisdiction, and without any explanation of the authority for such commitment, or of the object of it; and the prisoner would be released on *habeas corpus*. (j) In ordinary cases, where the offence is against the Queen's peace, and where the court acts in virtue of its inherent jurisdiction as a court over the offence, if the warrant of commitment appears to be defective, but the depositions show that a felony has been committed, the court will look at the depositions, and remand the prisoner, in order that the defect may be corrected. But in extradition cases, as the authority of the court is derived wholly from the treaty and the statutes, and by the latter the

(h) *Re Anderson*, 20 U. C. Q. B. 162, per *Robinson*, C. J. ; 11 U. C. C. P. 53-63 ; the *Chesapeake case*, 41.

(i) 11 U. C. C. P. 1 ; the *Chesapeake case*, 50.

(j) *Re Anderson*, 20 U. C. Q. B. 163, per *Robinson*, C. J. ; *ex parte Zink*, 6 Q. L. R. 280.

duty of deciding on the sufficiency of the evidence is cast on the committing magistrate, (*k*) they cannot look at the depositions, to ascertain whether the detention is warranted ; and as they cannot remand the prisoner, (*l*) if the warrant of commitment does not show a sufficient cause for the detention of the latter, he must be discharged. (*m*)

A warrant of commitment, which does not show that the magistrate deemed the evidence sufficient, according to the laws of the Province in which he has been apprehended, to justify the apprehension and committal for trial of the person accused, if the crime of which he is so accused had been committed therein, is bad. (*n*) The warrant must show that the offence was committed within the jurisdiction of the United States. (*o*) But it need not set out the evidence taken before the committing magistrate, nor show any previous charge made in the foreign country, or requisition from the Government of that country, or warrant from the Governor General of Canada, authorizing and requiring the magistrate to act. (*p*) But a warrant of commitment which omitted to state that the accused was brought before the magistrate or that the witnesses against him were examined in his presence was held to be bad on its face, and set aside. (*q*) The adjudication of the committing magistrate, as to the sufficiency of the evidence for committal may, however, be stated, by way of recital, in the warrant. (*r*)

A warrant of commitment, which directed the gaoler to receive the body of W. H., "and him safely keep for examination," was held defective in not mentioning the day, or limiting the time during which the prisoner was to be confined. (*s*) But in this case the warrant was considered as

(*k*) *Ante* p. 30.

(*l*) *Ante* p. 25.

(*m*) *Re Anderson*, 11 U. C. C. P. 1 *et. seq.*

(*n*) *The Chesapeake case*, 51 ; *Re Anderson*, 11 U. C. C. P. 64, per *Richards*, C. J. ; *ex parte Zink*, 6 Q. L. R. 260.

(*o*) *The Chesapeake case*, 4-45.

(*p*) *Re Burley*, 1 U. C. L. J. N. S. 34.

(*q*) *Ex parte Brown*, 2 L. C. L. J. 23, Q. B.

(*r*) *Re Burley*, *supra*.

(*s*) *Reg. v. Young, the St. Alban's Raid*, 5.

for an offence committed in Canada. It was held, in one case, that the words in an information and warrant of commitment "did feloniously shoot at with intent, and in so doing, feloniously, wilfully, and of malice aforethought to kill and murder," involved "an assault with intent to commit murder," within the language of the last Act, 31 Vic., c. 94, and, therefore, they were not bad on that ground, though it would have been more prudent to have followed the precise description of the offence given by the statute. (t)

It is not indispensable that the authority of the magistrate should be shown on the face of the warrant of commitment; and where the crime has been committed in a foreign country, and the committing magistrate has jurisdiction in every county in Ontario, the warrant is not bad though dated at Toronto, the county mentioned in the margin being York, but directed to the constables, etc. of the county of Essex, and being signed by the police magistrate, as such, for the county of Essex. (u)

But where the commital is in pursuance of a special authority, the warrant must be special and must exactly pursue that authority. (v)

In *Re Warner* (w) the court held that it is in the power of a magistrate, acting under the treaty and statutes, after issue of a writ of *habeas corpus*, but before its return, though after an informal return, to deliver to the gaoler a second or amended warrant, which, if returned in obedience to the writ, must be looked at by the court, or a judge, before whom the prisoner is brought; and *Hagarty*, J., (x) thought that although a magistrate, after his first warrant, transmitted copies of the testimony to the Governor, or even after committing the prisoner in the first instance, he is not precluded from issuing a second warrant in proper form against the prisoner.

(t) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 281.

(u) *Ibid.*

(v) *Ex parte Zink*, 6 Q. L. R. 260

(w) 1 U. C. L. J. N. S. 16.

(x) *Ibid.* 17.

Bail may be granted to extradition prisoners in a proper case, as to other offenders. And where a prisoner was committed for extradition to the United States, as the court would not sit at Montreal before the lapse of seven days from the commitment, his counsel applied to the court at Quebec by *habeas corpus* for bail, which was granted. (y) If the prisoner is discharged on the hearing of the warrant of arrest, there can be no bail required as a condition of such discharge. (z)

A prisoner charged with forgery in Canada was arrested in the United States and surrendered by the Government of that country under the treaty, upon application for bail, on the ground that there was no evidence of the *corpus delicti*. It was held that the depositions taken in Canada expressly charging the prisoner with forgery, followed by an application for the prisoner's surrender and his surrender accordingly, taken in connection with the fact that the evidence and proofs on which he was committed for surrender in the States must be held to be such as, under the treaty, to justify it according to the laws there, were sufficient evidence. (a)

The warrant of the Governor General, requiring the extradition of a prisoner from the United States for forgery, is no proof that he was charged with or extradited for that crime. (b)

In *Reg. v. Paxton* (c) the question was raised, but not decided, whether a party extradited from the United States for forgery was liable here to be tried for any other offence than the one for which he was surrendered.

The point came up again in *Re Rosenbaum*, (d) when it was decided that he was so liable, and that section 3 and subsection 2 of the Imperial Extradition Act, 1870, being inconsistent with the subsisting treaty between Great Britain and the United States, was not in force as to any application

(y) *Ex parte Foster*, 3 R. C. 46, Q. B.

(z) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 295, per *Draper*, C. J.

(a) *Reg. v. Vanaerman*, 4 U. C. C. P. 288.

(b) *Reg. v. Paxton*, 10 L. C. J. 212.

(c) *Ibid.*

(d) 18 L. C. J. 200, Q. B.

under such treaty. And it has been held in the United States that whether or not a prisoner had been extradited in good faith is a question for the two governments to determine, and not the courts; and the prisoner being, in fact, within the jurisdiction of the court, he must be tried. (e)

The provisions of the treaty for the payment of the expenses of the apprehension and delivery of the fugitive, by the party making the requisition, can be literally carried out by calling on the United States Government to pay such expenses when they make the requisition and receive the fugitive. By making the requisition they assume the responsibility of paying the expenses of apprehending as well as delivering him. (f)

Only one case has arisen in this country under the treaty between Great Britain and France, ratified in 1843. In this case it was held that, under the Imp. Stat. 6 & 7 Vic., c. 75, passed to give effect to the treaty, the Consul-General of France had no authority to demand the rendition of a fugitive criminal, such consul not being an accredited diplomatic agent of the French Government. That an informal translation of an *acte de renvoi* is not a judicial document equivalent to the warrant of arrest, of which the party applying for extradition is required to be the bearer, according to the statute. That the evidence of criminality to support the demand for extradition must be sufficient to commit for trial according to the laws of the place where the fugitive is arrested, and not according to the law of the place where the offence is alleged to have been committed. (g)

The *Chesapeake case* is the only one under the Imp. Stat. 6 & 7 Vic., c. 76. It was decided in 1864, before the suspension of the statute in New Brunswick. The many important points involved in this case have been given in the foregoing pages.

(e) Clarke on Extradition, 2nd Ed. p. 75.

(f) *Re Burley*, 1 U. C. L. J. N. S. 45, per Richards, C. J.

(g) *Ex parte Lamirande*, 10 L. C. J. 280.

It may be observed, in conclusion, that the Imp. Stat. 6 & 7 Vic., c. 34, makes provision for the apprehension and surrender to the authorities of the place where the offence has been committed, of persons who have committed offences either in the United Kingdom of Great Britain and Ireland, or in any part of Her Majesty's dominions, whether or not within the said United Kingdom, and who are found in any place in the United Kingdom, or any other part of Her Majesty's dominions, other than where the offence was committed.

The provisions of this statute as between the United Kingdom and the colonies, are very similar to those of our own statutes in aid of the Ashburton Treaty. The enactment only applies to treason, or some felony, such as justices of the peace in General Sessions have not authority to try in England under the provisions of an Act passed in the sixth year of the reign of Her Majesty, intituled "An Act to define the jurisdiction of Justices in General Sessions of the Peace." (*h*)

A person cannot under the 6 & 7 Vic., c. 34, be legally arrested or detained here for an offence committed out of Canada, unless upon a warrant issued where the offence was committed, and endorsed by a judge of a superior court in this country. (*i*) And such warrant must disclose a felony according to the law of this country; and the expression "felony, to wit, larceny," would seem to be insufficient. (*j*)

(*h*) See s. 10.

(*i*) *Reg. v. McHolme*, 8 U. C. P. R. 452.

(*j*) *Ibid.*

CHAPTER I.

CRIMES IN GENERAL.

In the present work it is proposed to treat in the first place of the subject of crimes in general, and the distinctions between a public and a private injury ; secondly, of the persons capable of committing crimes, and their several degrees of guilt, as principals or accessories ; thirdly, of the several species of crimes recognized by law ; after which will follow annotations of the Canadian statutes on criminal law and dissertations on the subjects of evidence, pleading and practice as developed in our own cases.

A crime is the violation of a right when considered in reference to the evil tendency of such violation as regards the community at large. (*a*)

Where, therefore, an Act declared that every person having a distilling apparatus in his possession, without making a return thereof as therein provided, should forfeit and pay a penalty of \$100, and rendered the apparatus liable to seizure and forfeiture to the Crown, it was held that an infringement of this Act was a crime. (*b*)

The violation of a statute containing provisions of a public nature, and more particularly so when that violation is spoken of as an offence, and is punishable by fine, or imprisonment as substitutionary for the fine, is a crime in law. (*c*)

When an offence is made a crime by statute, the proceedings instituted for the punishment thereof are criminal proceedings. (*d*) An information by the Attorney-General for an

(*a*) *Ste. Bla. Com.*, Bk. 6, p. 94.

(*b*) *Re Lucas & McGlashan*, 29 U. C. Q. B. 81 ; and see *Reg. v. Boardman*, 30 U. C. Q. B. 553.

(*c*) *Ibid.* 29 U. C. Q. B. 92, per *Wilson*, J.

(*d*) *Ibid.* 92, per *Wilson*, J. ; *Bancroft v. Mitchell*, L. R. 2 Q. B. 555, per *Blackburn*, J.

offence against the revenue laws is a criminal proceeding, (e) although offences against the customs and excise laws are not ordinarily treated as criminal but as merely penal in their nature ; and the contingent liability to fine and imprisonment does not alter the character of the offence. (f) A proceeding to obtain an order of affiliation under the (N.R.) 1 Rev. Stat., c. 57, is not a criminal proceeding, in which the party charged is punishable on indictment or summary conviction, (g) bastardy not being a crime punishable in this manner. (h)

The doctrine that all crimes concern the public prevails to such an extent, that by the policy of the law if a civil action is instituted, and it appears on the evidence that the facts amount to felony, the judge is bound to stop the proceedings and nonsuit the plaintiff, in order that the public justice may be first vindicated by the prosecution of the offender. (i)

The true ground of this rule is to prevent the criminal justice of the country from being defeated, (j) and the principle on which it rests is, not that the felony appearing constitutes any defence to the action, but that by the rule of law the civil remedy is suspended until the defendant charged with the felony shall have been acquitted or convicted in due course of law. (k) The rule applies, whether the plaintiff be the party upon whose person the alleged felony was committed, or a person who can sustain his cause of action only in virtue of a wrong done to him through another, by an act which, as between the defendant and that other, constitutes felony ; (l) and it seems the rule equally applies in an action against third persons. (m) The civil remedy is only suspended

(e) *Re Lucas & McGlashan*, 89, per *Richards*, C. J.

(f) *Ex parte Parks*, 3 Allen, 240, per *Carter*, C. J.

(g) *Ex parte Cook*, 4 Allen, 506.

(h) *Ibid.*

(i) *Walsh v. Nattrass*, 19 U. C. C. P. 453 ; *Brown v. Dalby*, 7 U. C. Q. B. 160 ; *Livingstone v. Massey*, 23 U. C. Q. B. 156 ; *Williams v. Robinson*, 20 U. C. C. P. 255 ; *Pease v. M'Aloon*, 1 Kerr, 111.

(j) *Crosby v. Leng*, 12 Ea. 414, per *Grose*, J.

(k) *Walsh v. Nattrass*, 19 U. C. C. P. 454, per *Gwynne*, J. ; *Brown v. Dalby*, 7 U. C. Q. B. 162, per *Robinson*, C. J.

(l) *Walsh v. Nattrass*, *supra*, 455, per *Gwynne*, J.

(m) *Pease v. M'Aloon*, 1 Kerr, 118, per *Parker*, J.

until an acquittal or conviction after a *bona fide* prosecution of the criminal charge. When either event takes place, as the public justice will then be satisfied, the party may proceed with his civil action. (n) It has not been decided whether a complaint to a justice of the peace, and statement on oath of the facts, would or would not be sufficient prosecution, if the justice should decline to interfere; but at all events, it would be sufficient to prefer a bill before the grand jury, who would of course ignore it if the prosecutor's evidence negatived the felonious intent, unless there should appear grounds for suspecting connivance or collusion. (o) A difference has been suggested between the case of a prior conviction and that of an acquittal, namely, that the latter may have been brought about by the defendant colluding with the prosecutor, and it seems evidence would be admissible to show this; (p) and that it would suspend the action. (q)

If there be two acts, the one felonious and the other not, and either one be sufficient to support the action, it may proceed, notwithstanding the evidence of the felony; (r) for it seems that only an action brought to recover compensation for an injury, resulting from the felonious act, is suspended. (s) At all events, in case of seduction, unless the loss of service, which is the gist of the action, directly springs from the very act supposed to be felonious, the civil remedy is not defeated. (t)

The question of felony or not cannot be tried by the jury, in the civil action, even though the judge may have a doubt on the evidence as to the facts showing a felony. (u) If a *prima facie* case is made out, and the evidence, uncontradicted

(n) *Walsh v. Nattrass*, 19 U. C. C. P. 456, per Gwynne, J.; *Pease v. M'Alon*, 1 Kerr, 117, per Parker, J.; *Edwards v. Kerr*, 13 U. C. C. P. 25, per Draper, C.; *Crosby v. Leng*, 12 Ea. 409.

(o) *Pease v. M'Alon*, 1 Kerr, 117, per Parker, J.

(p) *Crosby v. Leng*, 12 Ea. 413-4, per Lord Ellenborough, C. J.

(q) *Ibid.*

(r) *Walsh v. Nattrass*, 19 U. C. C. P. 457, per Gwynne, J.

(s) *Hayle v. Hayle*, 3 U. C. Q. B. O. S. 295.

(t) *Ibid.*

(u) *Williams v. Robinson*, 20 U. C. C. P. 255; *Walsh v. Nattrass*, 19 U. C. C. P. 453; *Pease v. M'Alon*, 1 Kerr, 111.

and unexplained, would warrant a jury in convicting for the felony, the judge should require the party to go before the criminal tribunal, before pursuing his civil remedy. (v)

If the judge is not morally satisfied that a felony has been committed, yet if the act were proved by only one witness to have been feloniously done, and there were no circumstances inconsistent with such evidence, nothing that could make the disbelief of it otherwise than purely arbitrary, the judge would not be wrong in nonsuiting the plaintiff. (w) It is for the judge to decide whether the case shall go to the jury in the civil action. (x) If the judge has reason for doubting whether the act is felonious, but nevertheless allows the case to go to the jury, and a verdict is found for the plaintiff, it will not be set aside, as this will only be done in the interests of public justice. (y)

We now proceed to notice the exceptions to the general rule suspending the civil remedy in case of felony. Under the Temperance Act of 1864, 27 & 28 Vic., c. 18, ss. 40 and 41, the legal representatives of the party might have maintained an action for damages against the inn-keeper, although the act giving rise to the right of action was also a felony, and the inn-keeper had neither been acquitted nor convicted. (z) So by the Carrier's Act, (a) the plaintiff may reply that the carrier's servant feloniously broke the goods in respect of which the action is brought, which will, if shown, entitle him to recover, although the servant has not been prosecuted criminally. (b) So under the Con. Stat. Can., c. 78, the civil action

(v) *Pease v. M'Aloon*, *supra*.

(w) *Williams v. Robinson*, 20 U. C. C. P. 256-7, per *Hagarty*, J.; *Brown v. Dalby*, 7 U. C. Q. B. 162-3, per *Robinson*, C. J.; see also *Vincent v. Sprague*, 3 U. C. Q. B. 283.

(x) *Walsh v. Nattrass*, 19 U. C. C. P. 456, per *Gwynne*, J.; *Williams v. Robinson*, 20 U. C. C. P. 255.

(y) *Walsh v. Nattrass*, *supra*; *Brown v. Dalby*, *supra*; *Williams v. Robinson*, *supra*; see also on this subject *Lutterell v. Reynell*, 1 M. & C. 233; *Stone v. Marsh*, 6 B. & C. 551; *Marsh v. Keating*, 1 Bing. N. C. 198; *Wellock v. Constantine*, 7 L. T. N. S. 751; 32 L. J. Ex. 285; 9 Jur. N. S. 232; *O'Howe v. Baylis*, 8 Jur. N. S. 1028.

(z) *McCurdy v. Swift*, 17 U. C. C. P. 126.

(a) 11 Geo. IV. and 1 Wm. IV., c. 68, s. 8.

(b) *McCurdy v. Swift*, *supra*, 136, per *Wilson*, J.

is maintainable, though the act causing the death amounts to felony, and the party has neither been acquitted nor convicted; (c) and, lastly, neither this rule nor the reasons for it apply to the Crown. (d) It is to be regretted that the decisions in Quebec are quite adverse to those in the other provinces on the above points. This is the only branch of the criminal law upon which there is any serious conflict in the decisions of the different provinces. It has been held in Quebec that the civil remedy is not suspended when a felony is disclosed in evidence, and this with reference to assault, perjury, arson, rape, and felony in general. (e)

It is an established principle of the common law that all crimes are considered local, and cognizable only in the place where they were committed; (f) but this rule has received several modifications by various statutes.

By the term crime, in its stricter sense, is meant such offences only as are punishable by indictment; those of an inferior character, punishable on summary conviction before a justice of the peace, being usually designated offences. (g)

Crimes are divided into two classes, namely, felonies and misdemeanors. (h) Felony is defined as an offence which occasions a total forfeiture of either lands or goods, or both, at the common law, and to which capital or other punishment may be superadded, according to the degree of guilt. (i) All crimes which are made felonies by the express words of a statute, or to which capital punishment is thereby affixed, become felonies, whether the word "felony" be omitted or mentioned. (j) Where a statute declares that the offender shall, under the circumstances, be deemed to have feloniously com-

(c) *McCurdy v. Swift*, 17 U. C. C. P. 136, per A. Wilson, J; *Clarke v. Wilson*, Rob. Dig. 260.

(d) *Reg. v. Reiffenstein*, 6 U. C. L. J. N. S. 38; 5 U. C. P. R. 175.

(e) *Dagenay v. Hunter*, Rob. Dig. 128; *Lamothe v. Chevalier*, 4 L. C. R. 160; *Fortier v. Mercier*, Rob. Dig. 127; *Peltier v. Miville*, *ibid.*; *McGuire v. Liverpool and London Assurance Company*, 7 L. C. R. 343; *Neill v. Taylor*, 15 L. C. R. 102.

(f) *The Chesapeake case*, 44, per Ritchie, J.

(g) *Sto. Bla. Com* Bk. 6, p. 96.

(h) *Re Lucas & McGlashan*, 29 U. C. Q. B. 92, per Wilson, J.

(i) 4 *Bla. Com.* 95.

(j) *Russ. Cr.* 4th Ed. 78; *Reg. v. Horne*, 4 Cox, C. C. 263.

mitted the act, it makes the offence a felony, and imposes all the common and ordinary consequences attending a felony. (k) So where a statute says that an offence, previously a misdemeanor, "shall be deemed and construed to be a felony," instead of declaring it to be a felony in distinct and positive terms, the offence is thereby made a felony. (l) An enactment that an offence shall be a felony, which was felony at common law, does not create a new offence. (m) But an offence shall never be made felony by the construction of any doubtful and ambiguous words of a statute; and, therefore, if it be prohibited under "pain of forfeiting all that a man has," or of "forfeiting body and goods," or of "being at the King's will for body, lands and goods," it shall amount to no more than a high misdemeanor; (n) and though a statute make the doing of an offence felonious, yet, if a subsequent statute make it penal only, the latter statute is considered as a virtual repeal of the former, so far as relates to the punishment of the offence. (o) So if an offence be felony by one statute, and be reduced to a misdemeanor by a later statute, the first statute is repealed. (p) When a statute on which the indictment is framed is repealed, after the bill has been found by the grand jury, but before plea, the judgment must be arrested; (q) and where a statute creating an offence is repealed, a person cannot afterwards be proceeded against for an offence within it, committed while it was in operation, even though the repealing statute re-enacts the penal clauses of the statute repealed. (r) If a later statute expressly alters the quality of an offence, as by making it a misdemeanor instead of a felony, or a felony instead of a misdemeanor, the

(k) *Rex v. Johnson*, 3 M. & S. 556, per Bayley, J.

(l) *Rex v. Solomons*, M. C. C. R. 292, overruling *Rex v. Cale*, M. C. C. R. 11.

(m) *Williams v. Reg.*, 7 Q. B. 253, per Patteson, J.

(n) *Russ. Cr.* 79.

(o) *Ibid.* 79.

(p) *Reg. v. Sherman*, 17 U. C. C. P. 171, per A. Wilson, J.; *Rex v. Davis*, 1 Leach, 271.

(q) *Reg. v. Denton*, 17 Jur. 453; *Reg. v. Swan*, 4 Cox C. C. 108.

(r) *Reg. v. Cummings*, 4 U. C. L. J. 187, per Macaulay, C. J.

offence cannot be proceeded for under the earlier statute ; (s) or if a later statute again describes an offence created by a former statute, and affixes to it a different punishment, varying the procedure, and giving an appeal where there was no appeal before, the prosecutor must proceed for the offence, under the latter statute. (t) If, however, in the case of a common law misdemeanor, a new mode of punishment, or new mode of proceeding, merely be directed, without altering the class of the offence, the new punishment, or new mode of proceeding, is cumulative, and the offender may be indicted as before for the common law misdemeanor. (u) Where a statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied that such second offence has been committed after a conviction for the first ; (v) and where a statute makes an offence felony which was before only a misdemeanor, an indictment will not lie for it as a misdemeanor, (w) for the lesser offence merges in the greater. But now, by the 32 & 33 Vic., c. 29, s. 50, although a felony appears on the facts given in evidence, a misdemeanor for which the party may be indicted will not merge therein, and the party may be convicted of such misdemeanor. But the statute has no other effect than to authorize a verdict of guilty on the indictment as it is framed, although the evidence would warrant a conviction for the higher offence. In other words, a party indicted for misdemeanor cannot, under this clause, be convicted of any felony that may be disclosed in evidence, but only of the misdemeanor for which he is indicted, if included in the felony proved ; and in accordance with this it has been held that a defendant indicted for a misdemeanor, in obtaining money under false pretences, could not, under the Con. Stat. Can.,

(s) *Michell v. Brown*, 1 E. & E. 267 ; 28 L. J. (M C) 53 ; *Reg. v. Sherman*, 17 U. C. C. P. 169, per A. Wilson, J. ; *Rez v. Cross*, 1 Ld. Raym. 711, 3 Salk. 193.

(t) *Michell v. Brown*, *supra*.

(u) *Rez v. Carlile*, 3 B. & Ald. 161 ; Arch. Cr. Pldg. 17th Ed. 3 ; see also *Reg. v. Palliser*, 4 L. C. J. 276.

(v) Russ. Cr. 79.

(w) *Rez v. Cross*, 1 Ld. Raym. 711 ; 3 Salk. 193.

c. 99 s. 62, be found guilty of larceny, although the facts would have warranted such finding. (x)

The word misdemeanor is usually applied to all those crimes and offences for which the law has not provided a particular name. (y) A misdemeanor is in truth any crime less than felony, and the word is generally used in contradistinction to felony, misdemeanors comprehending all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies, and public nuisances. (z) Misprision of felony is concealment of felony, or procuring the concealment thereof, whether it be felony at the common law or by statute. (a)

It is clear that all felonies and all kinds of inferior crimes of a public nature, as misprisions, and all other contempts, all disturbances of the peace, oppressions, misbehaviour by public officers, and all other misdemeanors whatsoever of a public evil example against the common law, may be indicted; (b) and it seems to be an established principle, that whatever openly outrages decency, and is injurious to public morals, is indictable as a misdemeanor at common law. (c) If a statute prohibit a matter of public grievance, or command a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specify no other mode of proceeding. (d) But no injuries of a private nature are indictable, unless they in some way concern the king. (e)

A general prohibitory clause supports an indictment, though there be afterwards a particular provision and a partial

(x) *Reg. v. Ewing*, 21 U. C. Q. B. 523.

(y) *Russ. Cr.* 79.

(z) *Ibid.* 79.

(a) *Ibid.* 79-80.

(b) *Russ. Cr.* 80.

(c) *Ibid.*

(d) *Reg. v. Toronto Street Ry. Co.*, 24 U. C. Q. B. 457, per *Draper*, C. J.; *Rex v. Davis*, Say. 133; and see *Rex v. Sainsbury*, 4 T. R. 451; *Russ. Cr.* 80.

(e) *Rex v. Richards*, 8 T. R. 634; *Russ. Cr.* 80.

remedy, (*f*) even though the act prescribes a summary mode of proceeding; (*g*) and it is not in all cases necessary to annex to it words showing that the intention was to make it an indictable offence, if the statute be violated. (*h*) If an Act of Parliament prohibits a thing being done under some specific penalty, then that penalty is all that can be enforced, but if in a different part of the statute certain consequences are entailed upon the prohibited act, then that is cumulative to the prohibition, and the act done contrary to the prohibition may or may not, according to the subject dealt with, be an indictable offence. (*i*) Where a statute forbids the doing of a thing, the doing it wilfully, although without any corrupt motive, is indictable. (*j*) If a statute enjoin an act to be done, without pointing out any mode of punishment, an indictment will lie for disobeying the injunction of the legislature. (*k*) This mode of proceeding in such case is not taken away by a subsequent statute, pointing out a particular mode of punishment for such disobedience. (*l*) Where the same statute which enjoins an act to be done contains also an enactment providing for a particular mode of proceeding, as commitment in case of neglect or refusal, it has been doubted whether an indictment will lie. (*m*) But where a statute only adds a further penalty to an offence prohibited by the common law, there is no doubt that the offender may still be indicted, if the prosecutor think fit, at the common law. (*n*)

An offence is not indictable where an Act of Parliament has pointed out a particular punishment and a specific method of recovering the penalty which it inflicts; and the rule is

(*f*) *Reg. v. Mason*, 17 U. C. C. P. 536, per *Richards*, C. J.; *Rex v. Boyall*, 2 Burr. 832; *Rex v. Wright*, 1 Burr. 543; *Reg. v. Buchanan*, 8 Q. B. 883; *Arch. Cr. Pldg.* 17th Ed. 2.

(*g*) *Pomeroy & Wilson*, 28 U. C. Q. B. 47-8, per *Hagarty*, J.

(*h*) *Reg. v. Mercer*, 17 U. C. Q. B. 632, per *Burns*, J.

(*i*) *Ibid.*

(*j*) *Rex v. Sainsbury*, 4 T. R. 457; *Reg. v. Holroyd*, 2 M. & Rob. 339.

(*k*) *Rex v. Davis*, Say. 133; *Reg. v. Price*, 11 A. & E. 727; *Reg. v. Toronto Street Ry. Co.*, 24 U. C. Q. B. 454.

(*l*) *Rex v. Boyall*, 2 Burr. 832; *Russ. Cr.* 87.

(*m*) *Rex v. Cummings*, 5 Mod. 179; *Rex v. King*, 2 Str. 1268.

(*n*) *Russ. Cr.* 88.

certain that where a statute creates a new offence by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offence by a particular method of proceeding, that particular method of proceeding must be pursued and no other. (o) On this ground it was held that an indictment would not lie on the 3rd sub-section of s. 55 Con. Stats. Can., c. 6, against a deputy returning officer for entering and recording in the poll books the names of several parties as having voted, although they had refused to take the oath required by law, the offence being created by the statute, a particular penalty affixed, and a specific remedy for enforcing it pointed out by the 87th section of the Act. (p) Where the penalty is annexed to the offence in the very clause of the Act creating it, no indictment or other proceeding can be taken against the person making default, (q) for the express mention of any other mode of proceeding impliedly excludes that of indictment. (r)

If a statute specify a mode of proceeding different from that by indictment, then if the matter were already an indictable offence at common law, and the statute introduced merely a different mode of prosecution and punishment, the remedy is cumulative, and the prosecutor has still the option of proceeding by indictment at common law or in the mode pointed out by the statute. (s) Therefore, where a Revenue Act (15 Vic., c. 28, s. 68) provided that any penalty or forfeiture inflicted under the Act should be recovered by action of debt or information, and sec. 72 enacted that if any person should assault any revenue officer in the exercise of his office he should, on conviction, pay a fine not exceeding £100 nor less than £50, which fine should be paid to the provincial

(o) *Reg. v. Bennett*, 21 U. C. C. P. 237, per Galt, J. ; *Reg. v. Mason*, 17 U. C. C. P. 538, per Richards, C. J. ; *Little v. Ince*, 3 U. C. C. P. 542-3, per Macaulay, C. J. ; see also *Leprohon v. Globenski*, Rob. Dig.

(p) *Reg. v. Bennett*, *supra*.

(q) *Ibid.* 238, per Galt, J.

(r) *Rex v. Robinson*, 2 Burr. 805 ; *Rex v. Buck*, 1 Str. 679.

(s) *Rex v. Robinson*, 2 Burr. 800 ; *Rex v. Wigg*, 2 Ld. Raym. 1163 ; *Rex v. Carlile*, 3 B. & Ald. 161.

treasurer, and in case of non-payment the offender should be imprisoned for a term not exceeding twelve months nor less than three months, at the discretion of the court; the court held that the Act only limited the discretion of the court as to the amount of fine and imprisonment on conviction for an assault under sec. 72, but did not alter the ordinary mode of proceeding therefor by indictment. (t)

Where a person filling a public office wilfully neglects or refuses to discharge the duties thereof, and there is no special remedy or punishment pointed out by statute, an indictment will lie, as there would otherwise be no means of punishing the delinquent. (u) So an indictment will lie for neglecting or refusing to administer the oath set forth in the Con. Stat. Can., c. 6, s. 55, at the request of the candidate or his agent. (v)

An attempt to commit a misdemeanor is a misdemeanor (w) whether the offence was created by statute or existed at common law, (x) for when an offence is made a misdemeanor by statute it is made so for all purposes. (y) So, inciting another to commit a misdemeanor is in itself a misdemeanor. (z) Therefore it was held that attempting to bargain with or procure a woman falsely to make the affidavit provided for by the Con. Stats. U. C., c. 77, s. 6, that A. was the father of her illegitimate child, was an indictable offence, on the ground that if the oath were taken and proven to be false, it would have amounted to perjury under the Con. Stats. U. C. c. 2, s. 15, or, at all events, to a misdemeanor, and inciting another to commit perjury is a misdemeanor on the above principle. (a) On an indictment for misdemeanor the jury may find the prisoner guilty of any lesser misdemeanor that

(t) *Reg. v. Walsh*, 3 Allen, 54.

(u) *Reg. v. Bennett*, 21 U. C. C. P. 238, per Galt, J.

(v) *Ibid.* 238, per Galt, J.

(w) *Reg. v. Connolly*, 26 U. C. Q. B. 322, per Hagarty, J.; *Reg. v. Martin*, 9 C. & P. 213; *Reg. v. Goff*, 9 U. C. C. P. 438.

(z) *Rex v. Butler*, 6 C. & P. 368, per Patterson, J.; *Rex v. Roderick*, 7 C. & P. 795, Parke, B.; *Rex v. Cartwright*, Russ. & Ry. 107.

(y) *Rex v. Roderick*, *supra*, 795, per Parke, B.

(s) *Reg. v. Clement*, 26 U. C. Q. B. 297.

(a) *Ibid.*

is necessarily included in the offence as charged, (b) and on an indictment for felony or misdemeanor the jury may find the party guilty of an attempt to commit it, which is a misdemeanor. (c) Under this statute (32 & 33 Vic., c. 29, s. 49) two prisoners may be convicted of misdemeanor, though one is charged with attempting to commit a felony, and the other as aiding and abetting him in the attempt. An indictment charged H. with rape, and U. with aiding and abetting him in the rape, the jury having found H. and U. guilty of a misdemeanor, H. of attempting to commit the rape, and U. of aiding him in the attempt; it was held that they were both properly convicted under the 14 & 15 Vic., c. 100, s. 9. (d) But upon this clause the defendant can only be convicted of an attempt to commit the very offence with which he is charged. (e) Nor can the jury convict under it of an attempt which is made felony by statute, but only of an attempt which is a misdemeanor. (f) But on an indictment for rape the prisoner may be convicted of an attempt to commit the rape, though the attempt is felony by statute, and the indictment is in the ordinary form. (g) An attempt to commit a felony is also a misdemeanor, (h) and an attempt to obtain money under false pretences is a misdemeanor. (i)

The act of attempting to commit a felony must be immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution. (j) Where, on an indictment for an attempt to commit burglary, it appeared that the prisoners had agreed to commit the offence on a certain night together with one C.,

(b) *Reg. v. Taylor*, L. R. 1 C. C. R. 196, per *Kelly*, C. B.

(c) *Reg. v. Goff*, 9 U. C. C. P. 438; 32 & 33 Vic., c. 29, s. 49.

(d) *Reg. v. Hapgood*, L. R. 1 C. C. R. 221.

(e) *Reg. v. McPherson*, Dears. & B. 197, 28 L. J. (M. C.) 134.

(f) *Reg. v. Connell*, 6 Cox, 178.

(g) *Reg. v. Webster*, 9 L. C. R. 196.

(h) *Reg. v. Goff*, 9 U. C. C. P. 438, per *Draper*, C. J.; *Reg. v. Remonda*, 28 U. C. Q. B. 152.

(i) *Reg. v. Goff*, *supra*.

(j) *Reg. v. McCann*, 28 U. C. Q. B. 517, per *Morrison*, J.; *Reg. v. Taylor*, 1 F. & F. 511.

but C. was kept away by his father, who had discovered their design. The two prisoners were seen about twelve o'clock that night to enter a gate about fifty feet from the house ; they came towards the house to a picket fence in front, in which there was a small gate, but they did not come nearer the house than twelve or thirteen feet, nor did they pass the picket gate ; they then went, as was supposed, to the rear of the house, and were not seen afterwards. About two o'clock some persons came to the front door and turned the knob, but went off on being alarmed and were not identified. The court held that there was no evidence of an attempt to commit the offence, no overt act directly approximating to its execution, and that a conviction therefor could not be sustained. (*k*) If, however, it had been proved that they attempted to enter the house, and were either interrupted or surprised in doing so, and made their escape, and that but for such surprise or interruption they could have carried out their design of stealing certain money said to be in the house, there would have been evidence to go to the jury. (*l*) It must appear upon the evidence that the felony might have been completed had there been no interruption. If, therefore, upon an indictment for attempting to commit a felony, by putting the hand into a woman's pocket with intent to steal her property therein, it appears that she had nothing in her pockets, a conviction cannot be sustained. (*m*)

The prisoner was indicted under 32 & 33 Vic., c. 21, s. 56, for breaking and entering a shop, with intent to commit felony. He was seen upon the roof, where a hole was found broken in, but there was no evidence of his having entered the building. The jury were directed that if they thought he broke the roof with intent to enter the shop and steal, they might find him guilty of an attempt. They accordingly convicted, and the court held that the conviction was right. (*n*)

(*k*) *Reg. v. McCann*, 28 U. C. Q. B. 514.

(*l*) *Ibid.* 516, per *Morrison*, J. ; see also *Reg. v. Eagleton*, 1 U. C. L. J. 179 ; *Deara*, C. C. 515 ; *Reg. v. Roberts*, *ibid.* 539 ; *Rex v. Martin*, 2 Mood. C. C. 123 ; 9 C. & P. 213-215 ; *Duvalle v. Reg.* 1 E. & B. 435.

(*m*) *Reg. v. Collins*, L. & C. 471 ; 33 L. J. (M. C.) 177 ; 10 U. C. L. J. 308.

(*n*) *Reg. v. Bain*, 8 U. C. L. J. 279 ; L. & C. 129 ; 31 L. J. (M. C.) 88.

But attempting to commit a felony is clearly distinguishable from intending to commit it, for the bare wish or desire of the mind to do an illegal act is not indictable. So long as an act rests in bare intention it is not punishable by our laws, (o) but immediately when an act is done the law judges not only of the act itself, but of the intent with which it was done, (p) and an act, though otherwise innocent, if accompanied by an unlawful and malicious intent, the intent being criminal, the act becomes criminal and punishable. (q)

It has been held under the corresponding English section of the 31 Vic., c. 72, s. 2, that the offence of soliciting and inciting a man to commit a felony is, where no such felony is actually committed, a misdemeanor only, and not a felony under the Act, which only applies to cases where a felony is committed as the result of the counselling and procuring therein mentioned. (r)

The motives of a party, though unimportant in civil cases, may be taken into account in criminal proceedings. (s) In the latter, however, the maxim, *actus non facit reum nisi mens sit rea*, does not hold universally. When a particular act is positively prohibited by law, it becomes thereupon *ipso facto* illegal to do it wilfully, and in some cases even ignorantly, and a party may be indicted for doing it without any corrupt motive. (t) Where a statute, in order to render a party criminally liable, requires the act to be done feloniously, maliciously, fraudulently, corruptly, or with any other expressed motive or intention, such motive or intention is a necessary ingredient in the crime; but where the enactment simply prohibits the doing of an act, motive or intention is immaterial so far as regards the legal liability of the party

(o) *Mulcahy v. Reg.*, L. R. 3 E. & I. App. 317, per *Willes*, J.

(p) *Reg. v. McCann*, 28 U. C. Q. B. 516, per *Morrison*, J.; *Reg. v. McPherson*, 1 Dears & B. C. C. 197, per *Cockburn*, C. J.; *Rex v. Higgins*, 2 Ea. 5, per *Le Blanc*, J.; *Rex v. Scofield*, Cald. 403.

(q) *Reg. v. Bryans*, 12 U. C. C. P. 172, per *Hagarty*, J.

(r) *Reg. v. Gregory*, L. R. 1 C. C. R. 77.

(s) *Phillips v. Eyre*, L. R. 6 Q. B. 21, per *Willes*, J.

(t) *Rex v. Sainsbury*, 4 T. R. 457, per *Ashurst*, J.

committing the forbidden act ; (u) and it would seem that a party cannot exempt himself from criminal liability on the ground that his object was lawful or even laudable, in committing an act simply prohibited by law ; (v) for the law infers that every person intends the natural consequences of his own act when that act is wrongful, injurious, and without legal justification. (w) The inference equally arises although the party has an honest or laudable object in view, and he will nevertheless be legally liable, unless the object is such as, under the circumstances, to render the act lawful. (x)

Misdemeanors differ from felonies in these particulars—the crime is of an inferior degree, and the penal consequences are not so severe ; secondly, all persons concerned in the commission of a misdemeanor, if guilty at all, are principals, and the law recognizes no degrees in their guilt.

With regard to the punishment of misdemeanors, it is a general rule that all those offences less than felony which exist at common law, and have not been regulated by any particular statute, are within the discretion of the court to punish, (y) and the punishment usually inflicted is fine and imprisonment. (z) The punishment of felonies is generally prescribed by statute.

(u) 4 C. L. J. N. S. 194.

(v) *Reg. v. Hicklin*, L. R. 3 Q. B. 360 ; *Reg. v. Recorder of Wolverhampton*, 18 L. T. Rep. N. S. 395.

(w) *Reg. v. Hicklin*, *supra*.

(x) *Ibid.* 375, per *Blackburn, J.* ; and see *Reg. v. Salter*, 3 Allen, 327, per *Carter, C. J.*

(y) Russ. Cr. 92.

(z) *Ibid.*

CHAPTER II.

THE PERSONS CAPABLE OF COMMITTING CRIMES, AND THEIR
SEVERAL DEGREES OF GUILT.

As a *prima facie* criminal liability attaches on every person, it is necessary to consider what defences may, in different cases, be urged by different persons, as grounds of exemption from punishment. The law requires an exercise of understanding and of will to render a person criminally responsible, therefore a want or defect of either may be a good defence. (a)

Infants.—The general rule is, that infants under the age of discretion are not punishable by any criminal prosecution whatever, but the age of discretion varies according to the nature of the offence. (b) Thus, in some misdemeanors and offences that are not capital, an infant is privileged, by reason of his nonage if under twenty-one; for instance, if the offence charged by the indictment be a mere nonfeasance, unless it be such as he is bound to do by reason of his tenure, or the like as to repair a bridge, (c) then, in some cases he shall be privileged, if under twenty-one, because laches shall not be imputed to him. (d) But if he be indicted for any notorious breach of the peace, as riot, battery, or for perjury, cheating, or the like, he is equally liable as a person of full age, because upon his trial the court, *ex officio*, ought to consider whether he was *doli capax*, and had discretion to do the act with which he was charged. (e) The law as to an infant's liability is more clearly defined with reference to capital crimes, though their criminal responsibility does not so much depend upon

(a) Russ Cr. 6.

(b) Arch. Cr. Pldg. 16.

(c) *Rex v. Sutton*, 3 A. & E. 597.

(d) Arch. Cr. Pldg. 17.

(e) *Ibid.* 17.

their age as upon their judgment and intelligence. (*f*) But within the age of seven years, no infant can be guilty of felony, or be punished for any capital offence, for within that age there is an irrebuttable presumption of law that he has no mischievous discretion. (*g*) On attaining the age of fourteen years, they are presumed to be *doli capaces*, and capable of discerning good from evil, and are, with respect to their criminal actions, subject to the same rule of construction as others of more mature age. (*h*)

Between the age of seven and fourteen years, an infant is deemed *prima facie* to be *doli incapax*, but *malitia supplet ætatem*, and this presumption may be rebutted by strong and pregnant evidence of mischievous discretion, establishing it beyond all doubt and contradiction. (*i*) When a child between the ages of seven and fourteen years is indicted for felony, two questions are to be left to the jury—first, whether he committed the offence; and secondly, whether at the time he had a guilty knowledge that he was doing wrong. (*j*)

An infant under fourteen is presumed by law to be unable to commit a rape, and therefore cannot be found guilty of it, and this on the ground of impotency as well as the want of discretion. This presumption, it seems, is not affected by the 32 & 33 Vic., c. 20, s. 65—making the offence complete on proof of penetration, without evidence of emission. (*k*) Nor is any evidence admissible to show that, in fact, the defendant had arrived at the full state of puberty, and could commit the offence. (*l*) But he may be principal in the second degree if he aid and assist in the commission of the offence, and it appear that he has a mischievous discretion. (*m*)

(*f*) Russ. Cr. 7.

(*g*) *Ibid.*; *Marsh v. Loader*, 14 C. B. N. S. 535.

(*h*) Arch. Cr. Pldg. 16.

(*i*) *Ibid.*

(*j*) *Rex v. Owen*, 4 C. & P. 236.

(*k*) *Rex v. Groombridge*, 7 C. & P. 582.

(*l*) *Rex v. Philips*, 8 C. & P. 736; *Rex v. Jordan*, 9 C. & P. 118; *Rex v. Brimlow*, *ibid.* 366; 2 Mood. C. C. 122.

(*m*) *Rex v. Eklershaw*, 3 C. & P. 396; see *Rex v. Allen*, 1 Den. C. C. 364; Arch. Cr. Pldg. 17.

It seems a statute creating a new felony does not extend to infants under the age of discretion, (*n*) and that statutes giving corporal punishment do not bind infants, but other and general statutes do, if infants are not excepted. (*o*) And where a fact is made felony, or treason, it extends as well to infants, if above fourteen, as to others. (*p*)

An infant, being unable to trade, cannot be prosecuted criminally for defrauding his creditors, as it cannot be contended that the contracts of an infant for goods supplied in the way of trade or for money lent are valid and result in debts, so as to give rise to the relation of debtor and creditor. (*r*)

Persons non compotes mentis.—Every person, at the age of discretion, is, unless the contrary be proved, presumed by law to be sane, and to be accountable for his actions. But if there be any incapacity, or defect of the understanding, as there can be no consent of the will, so the act cannot be culpable. (*s*) Where the deprivation of the understanding and memory is total, fixed and permanent, it excuses all acts, so, likewise, a man laboring under adventitious insanity is, during the frenzy, entitled to the same indulgence, in the same degree, with one whose disorder is fixed and permanent. (*t*) It seems clear, however, that to excuse a man from punishment on the ground of insanity, it must be proved distinctly that he was not capable of distinguishing right from wrong at the time he did the act, and did not know it to be an offence against the laws of God and nature. (*u*) If there be a partial degree of reason; a competent use of it sufficient to restrain those passions which produce the crime; if there be thought and design; a faculty to distinguish the nature of action; to discern the difference between moral good and evil,—then he will be responsible for his actions. (*v*)

(*n*) Russ. Cr. 10.

(*o*) Dwarris, 516.

(*p*) Russ. Cr. 10.

(*r*) *Reg. v. Wilson*, L. R. 5, Q. B. D. 28. ♣

(*s*) Arch. Cr. Pldg. 17.

(*t*) *Ibid.* 18; *Beverley's Case* Co. 125.

(*u*) *Rex v. Offord*, 5 C. & P. 168.

(*v*) *Reg. v. McNaughton*, 10 Cl. & Fin. 200; 1 C. & K. 130 n.; *Rex v. Higginson*, 1 C. & K. 129.

Where the intellectual faculties are sound, mere moral insanity—where a person knows perfectly well what he is doing, and that he is doing wrong, but has no control over himself, and acts under an uncontrollable impulse,—does not render him irresponsible. (w) Whether the prisoner were sane or insane at the time the act was committed is a question of fact triable by the jury, and dependent upon the previous and contemporaneous acts of the party.

Upon a question of insanity, a witness of medical skill may be asked whether, assuming certain facts proved by other witnesses to be true, they, in his opinion, indicate insanity. (x) It is said that, as to the criminal liability of a lunatic, the maxim is, *actus non facit reum nisi mens sit rea*. (y)

Imbecility, and loss of mental power, whether arising from natural decay, or from paralysis, softening of the brain, or other natural cause, although unaccompanied by frenzy, or delusion of any kind, constitutes unsoundness of mind, amounting to lunacy, within 8 & 9 Vic., c. 100. (z)

It is the duty of the Government to assume the care and custody of persons acquitted of criminal charges on the ground of insanity, and this power is vested in the Government, independently of any statute. (a) The policy of the law in detaining insane persons in custody is to prevent them from committing the same offences again. (b)

The vice of drunkenness, which produces a perfect though temporary frenzy, or insanity, will not excuse the commission of any crime; and an offender under the influence of intoxication can derive no privilege from a madness voluntarily contracted, but is answerable to the law equally as if he had been in the full possession of his faculties at the time. (c)

(w) *Reg. v. Burton*, 3 F. & F. 772.

(x) *Reg. v. Frances*, 4 Cox, 57, per *Alderson B. and Cresswell, J.*; *Reg. v. Wright, R. & R.* 456; *Reg. v. Searle*, 1 M. & Rob. 75; Arch. Cr. Pldg. 19.

(y) *Taggard v. Innes*, 12 U. C. C. P. 77, per *Draper, C. J.*

(z) *Reg. v. Shaw*, L. R. 1 C. C. R. 145, 37 L. J. (M. C.) 112.

(a) *Reg. v. Martin*, 1 James, 322.

(b) *Ibid.* 324, per *Bliss, J.*; see as to insane persons 32 & 33 Vic., c. 29, s. 99 et seq.

(c) Arch. Cr. Pldg. 18.

It has been said that, upon an indictment for murder, the intoxication of the defendant may be taken into consideration as a circumstance to show that the act was not premeditated. (*d*) But if the primary cause of the frenzy be involuntary, or it has become habitual and confirmed, this species of insanity will excuse the offender equally as the other descriptions of this malady. (*e*)

A deaf mute, incapable of understanding the proceedings at his trial, cannot be convicted, but must be detained as non-sane. (*f*)

Persons in subjection to the power of others.—In general, a person committing a crime will not be answerable if he was not a free agent and was subject to actual force at the time the act was done. (*g*) This exemption also exists in the public and private relations of society; public as between subject and prince, obedience to existing laws being a sufficient extenuation of civil guilt before a municipal tribunal; and private, proceeding from the matrimonial subjection of the wife to the husband, from which the law presumes a coercion which, in many cases, excuses the wife from the consequences of criminal misconduct. The private relations which exist between parent and child, and master and servant, will not, however, excuse or extenuate the commission of any crime of whatever denomination; for the command is void in law and can protect neither the commander nor the instrument. (*h*) In general, if a crime be committed by a *feme covert* in the presence of her husband, the law presumes that she acted under his immediate coercion, and excuses her from punishment. (*i*) But if she commit an offence in the absence of her husband, even by his order or procurement, her coverture will be no defence; (*j*) even though he appear at the

(*d*) *Reg. v. Grindley*, 1 Russ. 8; *Rex. v. Thomas* 7 C. & P. 817; *Rex. v. Meakin*, *ibid.* 297; but see *Rex. v. Carroll*, *ibid.* 145.

(*e*) Arch. Cr. Pldg. 18.

(*f*) *Reg. v. Berry*, L. R. 1 Q. B. D. 447.

(*g*) Russ. Cr. 32.

(*h*) Arch. Cr. Pldg. 22.

(*i*) *Ibid.* 22; and see *Reg. v. Smith*, Dears. & B. C. C. 553.

(*j*) *Ibid.* 22; 2 Reach, C. C. 1102; *Reg. v. Morris*, R. & R. 270

very moment after the commission of the offence; and no subsequent act of his, though it may render him accessory to the felony of his wife, can be referred to what was done in his absence. (*k*) This presumption, however, may be rebutted by evidence; and if it appear that the wife was principally instrumental in the commission of the crime, acting voluntarily and not by restraint of her husband, although he was present and concurred, she will be guilty and liable to punishment. (*l*)

The protection does not extend to crimes which are *mala in se*, and prohibited by the law of nature, nor to such as are heinous in their character, or dangerous in their consequences; and, therefore, if a married woman be guilty of treason, murder, or offences of the like description, in company with, or by coercion of, her husband, she is punishable equally as if she were sole. (*m*) So a married woman may be indicted jointly with her husband for keeping a bawdy house, (*n*) or gaming house, (*o*) for these are offences connected with the government of the house in which the wife has a principal share. (*p*) According to the prevailing opinion, it seems the wife may be indicted with her husband in all misdemeanors. (*q*) If a married woman incite her husband to the commission of a felony, she is accessory before the fact. (*r*) But she cannot be treated as an accessory for receiving her husband, knowing that he has committed a felony, nor for concealing a felony jointly with her husband, (*s*) nor for receiving from her husband goods stolen by him. (*t*) And she will not

(*k*) *Reg. v. Hughes*, 1 Russ. 21.

(*l*) *Reg. v. Cohen*, 11 Cox, 99; *Reg. v. Dicks*, 1 Russ. 19; *Reg. v. Hammond, Leach*, 447; Arch. Cr. Pldg. 22.

(*m*) *Ibid.* 23; see *Reg. v. Cruse*, 8 C. & P. 541; 2 Mood. C. C. 53; *Reg. v. Manning*, 2 C. & K. 903 n.

(*n*) *Reg. v. Williams*, 10 Mod. 63, 1 Salk. 384.

(*o*) *Reg. v. Dixon*, 10 Mod. 335.

(*p*) Arch. Cr. Pldg. 23.

(*q*) *Ibid.* 23; *Reg. v. Ingram*, 1 Salk. 384; but see *Reg. v. Price*, 8 C. & P. 19.

(*r*) *Reg. v. Manning*, 2 C. & K. 903 n.

(*s*) Arch. Cr. Pldg. 23.

(*t*) *Reg. v. Brooks*, Dears. C. C. 184; see *Reg. v. Archer*, 1 Mood. C. C. 143.

be answerable for her husband's breach of duty, however fatal, though she may be privy to his misconduct, if no duty be cast upon her, and she is merely passive. (*u*)

Ignorance.—The laws can only be administered upon the principle that they are known, because all persons are bound to know and obey them. (*v*) A mistake, or ignorance of law, is no defence for a party charged with a criminal act; (*w*) but it may be ground for an application to the merciful consideration of the Government. (*x*) But ignorance, or mistake of fact, may, in some cases, be a defence; (*y*) as, for instance, if a man intending to kill a thief in his own house, kill one of his own family, he will be guilty of no offence. (*z*) But this rule proceeds upon a supposition that the original intention was lawful; for if an unforeseen consequence ensue from an act which was in itself unlawful, and its original nature wrong and mischievous, the actor is criminally responsible for whatever consequences may ensue. (*a*)

Principals in the first and second degrees.—The general definition of a principal in the first degree is one who is the actor or actual perpetrator of the fact. (*b*) Principals in the second degree are those who are present aiding and abetting at the commission of the fact. (*c*) To prove a person an aider or abettor, it must be shown either that he was actually present aiding and in some way assisting in the commission of the offence, or constructively present for the same purpose—that is, in such a convenient situation as readily to come to the assistance of the others, and with the intention of doing so, should occasion require. (*d*) But there must be

(*u*) *Reg. v. Squires*, 1 Russ. 16; Arch. Cr. Pldg. 23.

(*v*) *Reg. v. Moodie*, 20 U. C. Q. B. 399, per Robinson, C. J.; *Reg. v. Mailloux*, 3 Pugsley, 493.

(*w*) *Reg. v. Moodie*, *supra*; *Unwin v. Clark*, L. R. 1 Q. B. 417; *Reg. v. Mayor of Tewkesbury*, L. R. 3 Q. B. 635, per Blackburn, J.

(*x*) *Reg. v. Madden*, 10 L. C. J. 344, per Johnson, J.

(*y*) *Unwin v. Clark*, L. R. 1 Q. B. 417, per Blackburn, J.

(*z*) *Reg. v. Levett*, Cro. Car. 538.

(*a*) Arch. Cr. Pldg. 24.

(*b*) *Ibid.* 7.

(*c*) *Ibid.* 8.

(*d*) *Ashley v. Dundas*, 5 U. C. Q. B. O. S. 753, per Sherwood, J.; *Reg. v. Curtley*, 27 U. C. Q. B. 617, per Morrison, J.

some participation, for the fact that a person is actually present at the commission of a crime does not necessarily make him an aider or abettor. If one sees a felony is about to be committed, and in no manner interferes to prevent it, he does not thereby participate in the felony committed, so as to render him liable as a principal in the second degree. It should be proved that he did or said something showing his consent to the felonious purpose, and contributing to its execution. (e)

If a fact amounting to murder should be committed in prosecution of some unlawful purpose, though it were but a bare trespass, all persons who had gone in order to give assistance, if necessary, for carrying such unlawful purpose into execution, would be guilty of murder. But this applies only to a case where the murder is committed in prosecution of some unlawful purpose—some common design, in which the combining parties were united, and for the effecting whereof they had assembled. (f) For when the act of homicide is not done with the concurrence of all those present, there must be evidence of a precedent common purpose to prosecute the unlawful enterprise, even to the extent of extreme and deadly violence. (g) Even in case of felony, there must either be a previous or present concurrence in the act by all to render them liable, (h) otherwise none but the party actually committing the act will be liable. (i)

In the *Curtley case* the prisoner C. was indicted for aiding and abetting one M. in a murder, of which M. was convicted. It appeared that, about six in the evening, the deceased was with R. and his wife on the river bank at Amhertsburg, standing near a pile of wood. R.'s wife testified that she saw M. standing behind the pile, who, on deceased going up to him,

(e) *Reg. v. Curtley*, 27 U. C. Q. B. 619, per *Morrison*, J.

(f) *Ibid.* 617, per *Morrison*, J.

(g) *Ibid.* 617, per *Morrison*, J. ; *Rex v. Collison*, 4 C. & P. 565 ; *Reg. v. Howdell*, 9 C. & P. 437.

(h) *Ibid.* 617, per *Morrison*, J. ; *Reg. v. Franz*, 2 F. & F. 580.

(i) *Ibid.* 617, per *Morrison*, J. ; *Reg. v. Skeet*, 4 F. & F. 931 ; *Reg. v. Price*, 8 Cox, C. C. 96.

struck deceased a blow with a stick, of which he ultimately died. Some time after the stroke, deceased ran, when two other men sprang out, and followed him; but in a few seconds two of them returned, and assaulted witness and R., her husband. She could not identify the prisoner. Two other witnesses saw deceased running from the direction of the wood pile, and across the road, when he fell over a stick of timber. They saw a man, at the same time, come running from the wood pile, and, as deceased got up, he struck him with a stick, knocking him down, and again struck him on the head, and then the man ran off to the north. One of them identified this man as M., but the other did not know him. One witness, B., swore that, about six on that evening, deceased left his office with R. and his wife, and that, about twenty minutes after, he saw the prisoner, with M. and another, go into the vacant lot where the wood pile was, M. having a stick in his hand, and heard M. say to the others, "Let us go for him." It was also proved by others that, before the affray, the three were together near the wood pile in question, and were also in a saloon together about nine o'clock afterwards. The prisoner was convicted on this evidence, and a rule *nisi* was obtained for a new trial on his behalf on the ground that there was no evidence to go to the jury sufficient to justify his conviction. The rule was made absolute, for there was no direct proof that the prisoner was present when the blows were struck, or when the affray began, and no evidence whatever that he and the others were together with any common unlawful purpose, and the expression used by M., "Let us go for him," in the absence of evidence that M. was alluding to the deceased, or that the prisoner and M. were aware that the deceased was at the wood pile, was unimportant *per se*, as indicating the intention of the parties, and was obviously susceptible of different applications. (j)

Whenever a joint participation in an act is shown, or there

(j) *Reg. v. Curtley*, 27 U. C. Q. B. 613.

is a general resolution against all opposers, each person is liable for every act of the others, in furtherance of the common design. (*k*) And if a number of persons are confederated for an unlawful purpose, and in pursuit of their object commit felony, any person present in any character, aiding and abetting, or encouraging the prosecution of the unlawful design, is involved in a share of the common guilt. (*l*)

But this doctrine will apply only to cases where the act intended to be accomplished is unlawful in itself. For if the original purpose is lawful and prosecuted by lawful means, if one of the party commit a felonious act, the others will not be involved in his guilt, unless they actually aided or abetted him in the fact. (*m*) In other words, a felonious act committed by one person in prosecution of a common unlawful purpose is the act of all, but if the purpose is lawful, the person committing the act will alone be liable. By an unlawful purpose is meant such as is either felonious, or if it be to commit a misdemeanor, then there must be evidence to show that the parties engaged intended to carry it out at all hazards. (*n*) The act must also be committed in prosecution of the unlawful purpose, and be the result of the confederacy. (*o*)

A prisoner was convicted of unlawfully attempting to steal the goods of one J. G. It appeared that he had gone with one A. from Toronto to Cooksville, and examined J. G.'s store, with a view of robbing it; and that afterwards A. and three others having arranged the scheme with the prisoner, started from Toronto, and made the attempt, but were disturbed, after one had gone into the store through a panel taken out by them; the prisoner saw them off from Toronto, but did not go himself. It was held that as those actually engaged were guilty of an attempt to steal, and as the evidence established,

(*k*) *Reg. v. Slavin*, 17 U. C. C. P. 205; Russ. Cr. 56.

(*l*) *Reg. v. Lynch*, 26 U. C. Q. B. 208; see also *Reg. v. McMahon*, 26 U. C. Q. B. 195.

(*m*) Russ. Cr. 56.

(*n*) *Reg. v. Skeet*, 4 F. & F. 931; see also *Reg. v. Luck*, 3 F. & F. 483; *Reg. v. Crow*, 8 Cox, 335.

(*o*) *Reg. v. White*, R. & R. 99; Arch. Cr. Pldg. 950.

the prisoner had counselled and procured the doing of that act, and as such attempt was a misdemeanor, being an attempt to commit a felony, the prisoner, under the 31 Vic., c. 72, s. 9, was properly convicted. (p) This statute is clear, that if the prisoner was accessory before the act, he could be indicted as if he were personally present. (q)

So where J. and T. were driving a trap along the turnpike road for a lawful purpose, and J. got out of the trap, went into a field and shot a hare, which he gave to T., who had remained in the trap. J. having been convicted of trespass in pursuit of game, an information was laid under the 11 & 12 Vic., c. 43, against T., charging him with being present aiding and abetting. On a case stated by the justices, it was held that there was abundant evidence on which the justices might have come to the conclusion that both were engaged in a common purpose, and that T. was guilty. (r)

But where upon an indictment against E., H., and another for stealing and receiving, it was proved that H. was walking by the side of the prosecutrix, and E. was seen just previously following her; that the prosecutrix felt a tug at her pocket and found her purse gone, and, on looking round, saw H. walking with E. in the opposite direction, and saw H. handing something to him, and the jury, in accordance with the direction of the presiding judge, found H. guilty of stealing and E. of receiving, it was objected, that the jury should have been told to find E. guilty of stealing or of no offence, as upon the facts proved he was a principal in the second degree, aiding and abetting, present, and near enough to afford assistance. But the court held the charge and conviction were right, *Williams, J.*, being of opinion that the evidence did not show a common purpose and intention; while *Wightman, J.*, thought that the jury might very well have inferred concert, but they had not done so, and their finding should not be disturbed. (s)

(p) *Reg. v. Esmonde*, 26 U. C. Q. B. 152.

(q) *Ibid.* per *Hagarty, J.*

(r) *Stacey v. Whitehurst*, 13 W. R. 384.

(s) *Reg. v. Hilton*, 5 U. C. L. J. 70; *Bell*, 20; 28 L. J. (M. C.) 28.

Accessories before and after the fact.—An accessory before the fact is he who, being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony. (t) An accessory after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. (u) It is only in felonies that there can be accessories, for in misdemeanors all are principals. (v) By the 31 Vic., c. 72. s. 9, aiders and abettors in misdemeanors are liable to be indicted, tried, and punished as principal offenders.

There can be no accessories to a felony unless a felony has been committed. (w) Ordinarily, there can be no accessories before the fact in manslaughter, for the offence is sudden and unpremeditated. (x) Where, however, the prisoner procured and gave a woman poison, in order that she might take it, and so procure abortion, and she did take it in his absence and died of its effects, it was held that he might be convicted as an accessory before the fact to the crime of manslaughter. (y) There may, however, be accessories after the fact in manslaughter. (z) The offence of an accessory is distinguishable from that of a principal in the second degree: the latter must be actually or constructively present at the commission of the fact. But it is essential to constitute the offence of accessory that the party should be absent at the time the offence is committed. (a) On an indictment charging a man as a principal felon only, he cannot be convicted of the offence of being an accessory after the fact. (b)

(t) Arch. Cr. Pldg. 11.

(u) *Ibid.* 14.

(v) *Reg. v. Tisdale*, 20 U. C. Q. B. 273, per *Robinson*, C. J.; *Reg. v. Campbell*, 18 U. C. Q. B. 417, per *Robinson*, C. J.; *Reg. v. Benjamin*, 4 U. C. C. P. 189, per *Macaulay*, C. J.

(w) *Reg. v. Gregory*, L. R. 1 C. C. R. 77; 36 L. J. (M. C.) 60.

(x) Russ. Cr. 59.

(y) *Reg. v. Gaylor*, 1 Dears. & B. C. C. 288; see also *Reg. v. Smith*, 2 Cox, 233, per *Parke*, B.

(z) Russ. Cr. 59, n.; see *Rex v. Greenacre*, 8 C. & P. 35.

(a) *Rex v. Gordon*, 1 Leach, 515; Arch. Cr. Pldg. 11.

(b) *Reg. v. Fallon*, L. & C. 217; 32 L. J. (M. C.) 66.

The principle of law, both in civil and criminal cases is that a person is liable for what is done under his presumed authority. (c) The owner of a shop is liable for any unlawful act done therein in his absence by a clerk or assistant in the ordinary course of business, for *prima facie* it would be his act; but it would seem that if the act was wholly unauthorized by him, and out of the usual course of business, he might escape personal responsibility. (d) But the agent is also liable for an unlawful act, although he may have the express or implied authority of his principal for its commission. (e) And a party who maintains a public nuisance as the agent of another, is a principal in the misdemeanor, and cannot justify on the ground of his agency. (f) There seems, however, to be a great distinction between the authority or procurement which will render a man liable civilly and that which will render him liable criminally. In the former, the authority must be strictly pursued; but, in the latter, the principal may be criminally liable, though the agent deviate widely from his authority. (g) Thus the owner of works carried on for his profit by his agents is liable to be indicted for a public nuisance caused by acts of his workmen in carrying on the works, though done by them without his knowledge, and contrary to his general orders. (h)

So, in a prosecution for a penalty in selling liquor without license, proof that the sale was made by a person in the defendant's shop, in his absence, and without showing any general or special employment of such person by the defendant in the sale of liquors, is sufficient *prima facie* evidence against him. (i) So, the proprietor of a newspaper was held indictable for a libel published therein, though he took no actual share in the publication, and lived one hundred miles

(c) *Reg. v. King*, 20 U. C. C. P. 248, per *Hagarty*, C. J. ; see also *Atty. Gen. v. Siddon*, 1 Tyr. 47.

(d) *Ibid.*

(e) *Reg. v. Brewster*, 8 U. C. C. P. 208.

(f) *Ibid.*

(g) *Parkes v. Prescott*, L. R. 4 Ex. 182, per *Byles*, J.

(h) *Reg. v. Stephens*, L. R. 1 Q. B. 702, 35 L. J. Q. B. 251.

(i) *Ex parte Parks*, 8 Allen, 237.

distant from the place of publication, and was confined to his house by illness when the paper complained of appeared. (j) Where the defendant was absent in New York, and his wife, who was intrusted with the ordinary management of the defendant's business in his absence, had a wild duck in her possession, contrary to the Lower Canada Game Act, 22 Vic., c. 103, the court held that the defendant was responsible, on the ground that the wife was acting as the agent of the husband, and should be presumed to have his authority for the illegal act complained of; and a conviction of the husband (the defendant) and imposition of a penalty was consequently sustained. (k)

Upon information for unlawfully selling beer, under 4 & 5 Wm. IV, c. 85, s. 17, it was proved that the appellant's wife had actually supplied the beer to three persons who had asked the appellant for beer, and to whom he had said, whilst pointing to his wife, "You must ask her," it was held that upon this evidence the conviction was right. In this case there was an appeal against the decision of the justices. It was argued that if the wife acted as agent for her husband, they both ought to have been summoned and convicted together. However, the court gave judgment for the respondent. (l)

It is conceived that the principles involved in the foregoing cases will apply to principals and accessories in felonies. In other words, that the authority or procurement which will in misdemeanors render a man liable as a principal for the act of his agent, will, in felonies, render him liable as an accessory before the fact: for it is a principle of law that he who procures a felony to be done is a felon. (m)

The procurement may be personal, or through the intervention of a third person. (n) It may also be direct by hire, counsel, command, or conspiracy; or indirect, by evincing an express liking, approbation, or assent to another's felonious

(j) *Ex parte Parks*, 3 Allen, 241, per Carter, C. J.

(k) *Reg. v. Donaghue*, 5 L. C. J. 104.

(l) *Reg. v. Smith*, 5 U. C. L. J. 142.

(m) *Ru-a. Cr.* 59.

(n) *Rex v. Cooper*, 5 C. & P. 535; *Arch. Cr. Pldg.* 11.

design of committing a felony. (*o*) But there must be some sort of active proceeding on the part of the individual to render him an accessory ; he must incite, procure or encourage the act ; and the mere consent on the part of a prisoner to hold stakes put up by two persons, who, having quarrelled, had agreed to fight with their fists at a future time, was held not to be such a participation as is necessary to constitute him an accessory before the fact to the crime of manslaughter, one of the combatants having died from wounds received in the fight. (*p*) The procurement must also be continuing ; for if the procurer of a felony repent, and, before the felony is committed, actually countermand his order, and the principal, notwithstanding, commit the felony, the original contriver will not be an accessory. (*q*) So, if the accessory order or advise one crime, and the principal intentionally commit another, the accessory will not be answerable. (*r*) But it is clear that the accessory is liable for all that ensues upon the execution of the unlawful act commanded ; (*s*) and a substantial compliance with his instigation, varying only in circumstances of time or place, or in the manner of execution, will involve him in the guilt, and, even when the principal goes beyond the terms of the solicitation, yet, if in the event the felony committed was a probable consequence of what was ordered or advised, the person giving such orders or advice will be an accessory to that felony. (*t*) A wife is not punishable as accessory for receiving her husband although she knew him to have committed a felony ; (*u*) for she is presumed to act under his coercion. But no other relation of persons can excuse the wilful receipt or assistance of felons. (*v*)

(*o*) *Rex v. Cooper*, 5 C. & P. 535.

(*p*) *Reg. v. Taylor*, L. R. 2 C. C. R. 147.

(*q*) *Arch. Cr. Pldg.* 11.

(*r*) *Ibid.* 12.

(*s*) *Ibid.*

(*t*) *Russ. Cr.* 62.

(*u*) *Reg. v. Manning*, 2 C. & K. 903 n. ; *Arch. Cr. Pldg.* 14.

(*v*) *Arch. Cr. Pldg.* 14.

(*w*) *Ibid.* 15.

(*x*) *Russ. Cr.* 61 ; *Dwarris*, 518 ; and see 31 Vic., c. 72 ; *Reg. v. Smith*, L. R. 1 C. C. R. 266 ; per *Bovill*, C. J.

To constitute the offence of accessory after the fact, it is necessary that the accessory have notice, direct or implied, at the time he assists or comforts the felon, that he had committed a felony ; and it is also necessary that the felony be complete at the time the assistance is given. (w)

As to felonies created by statute, if an Act of Parliament ordain an offence to be felony, though it mention nothing of accessories before and after the fact, yet, virtually and consequentially, those that counsel or command the offence are accessories before the fact, and those who knowingly receive the offenders are accessories after. (x) It is a maxim that *accessorius sequitur naturam sui principalis*, and, therefore, an accessory cannot be guilty of a higher crime than his principal. (y)

The 31 Vic., c. 72, makes provision for the trial of accessories before and after the fact. This statute alters the old rule by which an accessory could not be brought to trial until the guilt of his principal had been legally ascertained by conviction. By this act, accessories before the fact are triable in all respects as principal felons ; and every principal in the second degree is punishable in the same manner as the principal in the first degree is punishable.

By s. 8, in the case of a felony wholly committed within Canada, the offence of any person who is an accessory either before or after the fact, to such felony, may be dealt with, inquired of, tried, determined, and punished by any court which has jurisdiction to try the principal felony, or any felonies committed in any district, county, or place in which the act by reason whereof such person shall have become such accessory has been committed.

(y) Russ. Cr. 61.

CHAPTER III.

OFFENCES PRINCIPALLY AFFECTING THE GOVERNMENT, THE
PUBLIC PEACE, OR THE PUBLIC RIGHTS.

Coinage offences.—These offences are now regulated by the 32 & 33 Vic., c. 18. Where a prisoner ordered dies of a maker impressed with the resemblance of the sides of a sovereign, and the maker gave information to the police, who communicated with the authorities of the mint, and the latter, through the police, permitted him to give them to the prisoner, it was held no lawful authority under section 24. (a) It is necessary in the indictment to negative lawful authority or excuse, notwithstanding that the burden of proof lies upon the accused; but the word "excuse" includes "authority," and therefore the word "excuse" alone in an indictment under this section is good. (b) A prisoner knowingly in possession of dies has sufficient guilty knowledge to constitute felony, whatever his intention as to their use may be, for there is nothing in the act to make the intent any part of the offence. (c)

The 32 & 33 Vic., c. 29, s. 26, applies to a trial on an indictment under s. 12 of the Coinage Act for feloniously having in possession counterfeit coin after a previous conviction for uttering counterfeit coin; and, therefore, the previous conviction cannot be proved until the jury find the prisoner guilty of the subsequent offence: (d) and a prisoner, indicted under s. 12 of the Coinage Act for the felony of uttering, after a previous conviction for a like offence, cannot be convicted of the misdemeanor of uttering if the jury negative the previous

(a) *Reg. v. Harvey*, L. R. 1 C. C. R. 284.

(b) *Ibid.*

(c) *Ibid.*

(d) *Reg. v. Martin*, L. R. 1 C. C. R. 214; 39 L. J. (M. C.) 31; *Reg. v. Goodwin*, 10 Cox, 584, overruled.

conviction ; for felony and misdemeanor are different things, and on an indictment for one there can be no conviction for the other, except by express enactment. (e) Where coin was counterfeited to resemble smooth worn shillings then in circulation, without any impression whatever upon them, it was held to be a sufficient counterfeiting. (f) So a genuine sovereign filed at the edges to such an extent as to reduce its weight by one twenty-fourth part and to remove the milling almost entirely, and a new milling added in order to restore the appearance of the coin, was held to be false and counterfeit. (g) By the old law, the counterfeit coin must have appeared to have that degree of resemblance to the real coin that it would likely be received as the coin for which it was intended to pass by persons using the caution customary in taking money ; and the coin must have been in a complete and perfect state, ready for circulation. (h) Now, however, by the 32 & 33 Vic., c. 18, s. 32, the offence shall be deemed complete although the coin was not in a fit state to be uttered or the counterfeiting thereof was not finished or perfected. By sec. 30 any creditable witness may prove the coin to be false or counterfeit. (i) The Imp. Act 16 & 17 Vic., c. 48, is not in force here. (j) But the Imp. Stat. 16 & 17 Vic., c. 102, respecting gold, silver, and copper coin, applies to this country. (k)

In an indictment under sec. 22 of the Coinage Act, it would seem to be necessary to allege that the coin was not current by law in this province. (l)

Foreign enlistment offences.—The Imperial statute 33 & 34 Vic., c. 90, is now the governing enactment on this subject.

(e) *Reg. v. Thomas*, L. R. 2 C. C. R. 141.

(f) *Reg. v. Wilson*, 1 Leach, 285 ; *Reg. v. Welsh*, *ibid.* 364 ; Arch. Cr. Pldg. 745.

(g) *Reg. v. Hermann*, L. R. 4 Q. B. D. 284.

(h) *Reg. v. Varley*, 2 W. Bl. 682 ; *Reg. v. Harris*, 1 Leach, 135 ; Arch. Cr. Pldg. 745.

(i) See also sec. 31.

(j) See 32 & 33 Vic., c. 18, s. 36.

(k) *Warner v. Pyron*, 2 L. C. J. 105.

(l) *Reg. v. Turney*, 29 U. C. Q. B. 181.

It extends to the whole Dominion of Canada, including the adjacent territorial waters. (*m*) This statute is highly penal in its character. (*n*) It, however, strengthens the hands of the Government, and enables it to fulfil more easily than heretofore that particular class of international obligations which may arise out of the conduct of Her Majesty's subjects towards belligerent foreign states with whom Her Majesty is at peace.

It should be so construed as, on the one hand, to give, if possible, due and full execution to its main purpose, and, on the other hand, not to strain its provisions so as to fetter the private commerce of Her Majesty's subjects beyond the express limits which the statute, for the general interests of the public weal, has prescribed. (*o*)

The 59 Geo. III., c. 69, was in force here until the passing of the former statute, the Provincial Act 28 Vic., c. 2, having been passed in aid of it; so that any provisions of the local statute in conflict with the Imperial Act would not prevail against the latter. (*p*) The local enactment will now stand repealed in so far as it is repugnant to the Imp. 33 & 34 Vic., c. 90, but no farther. (*q*)

But little judicial light has been thrown on the latter statute, but several cases have been decided in our courts under the old Act the results of which are given here.

A warrant of commitment, issued under the 59 Geo. III., c. 69, is sufficiently certain if it charges the prisoner with attempting or endeavoring to hire, retain, engage, or prevail on to enlist as a soldier, in the land or sea service, for, or under, or in aid of Abraham Lincoln, President of the United States of America, and in the service of the Federal States of America. The foregoing is also a sufficient description of the foreign power in the warrant; the power being one whose

(*m*) See sec. 2.

(*n*) *The Gauntlet*, L. R. 3 Ad. & Ec. 388, per Sir R. Phillimore.

(*o*) *The International*, L. R. 3 Ad. & Ec. 332, per Sir R. Phillimore.

(*p*) *Reg. v. Sherman*, 17 U. C. C. P. 166; *Reg. v. Schram*, 14 U. C. C. P. 318.

(*q*) See sec. 2; see also Imp. Stat. 28 & 29 Vic., c. 63, s. 2.

existence the court is bound to notice judicially, and the words relating to the Federal States being rejected as surplusage. In such a warrant, it is not necessary to allege that the accused is a British subject, the law presuming him to be such until the contrary appears; nor to negative a license from Her Majesty the Queen to do the act or acts concerning which the complaint is laid. (r) A direction to the gaoler to keep the prisoner in the common gaol, "until he shall thence be discharged by due course of law, or good and sufficient sureties be received for his appearance," is sufficient—the latter words being looked upon either as surplusage, or as a valid direction, inasmuch as the magistrates having committed the prisoner for want of bail, it would be in the discretion of the magistrates or court ordering bail to fix the amount.

"I," in the text of a warrant, may be read as "I and I," so as to read "given under my and my" hand and seal, etc., it being presumed that both magistrates use one and the same seal. (s) A warrant of commitment reciting that Thaddeus K. Clarke "was this day charged (not saying upon oath) before us," and without showing any examination by the magistrates, upon oath or otherwise, into the nature of the offence, and commanding the constables or peace officers of the county of Welland to take the said Thaddeus K. Clarke into custody, was held sufficient. (t) A warrant committing the prisoner "until discharged by due course of law," sufficiently complies with the statute, which provides for a committal until delivered by due course of law. A warrant executed by two parties, and concluding "given under our hand and seal," is sufficient. (u) A warrant of commitment, reciting that F. M. was charged, on the oath of J. W., "for that he (F. M.) was this day charged with enlisting men for

(r) *Re Smith*, 10 U. C. L. J. 247; but see *re Martin*, 3 U. C. P. R. 298.

(s) *Re Smith*, 10 U. C. L. J. 247.

(t) *Re Clarke*, 10 U. C. L. J. 331.

(u) *Ibid.*; see also *re Smith*, 10 U. C. L. J. 247.

the United States army, offering them \$350 each as bounty," without charging any offence with certainty, was held bad. (v)

The third part of the seventh section of this Act, prohibiting vessels from engaging in foreign service, is in the alternative, and it is not necessary that the vessel should be acting in the service of "any person or persons exercising, or assuming to exercise, any powers of government in or over any foreign state, colony, province, or part of any province or people," if the vessel is "employed in the service of any foreign state, or people, or part of any province or people." (w)

It has been doubted whether the jurisdiction conferred by the 28 Vic. c. 2, is a general or a local one. (x)

A commitment under that statute, stating the offence as follows: "For that he on, etc., at, etc., did attempt to procure A. B. to serve in a warlike or military operation, in the service of the Government of the United States of America, omitting the words "as an officer, soldier, sailor, etc.," is bad. (y)

A judgment for too little is as bad as a judgment for too much, and a condemnation to pay \$100 and costs—the statute imposing \$200 and costs—is bad. (z) So a commitment on a judgment for the penalty and costs, not stating, in the body of the commitment, or a recital in it, the amount of costs, is bad. (a) But a warrant of commitment, on a conviction had before the police magistrate for the town of Chatham, in Ontario, under the 28 Vic., c. 2, averring that, on a day named, "at the town of Chatham, in said county, he, the said Andrew Smith, did attempt to procure A. B. to enlist to serve as a soldier in the army of the United States of America, contrary to the statute of Canada in such case made and provided," and then proceeding, "and whereas the said Andrew Smith was duly convicted of the said offence before me, the said

(v) *Re Martin*, 3 U. C. P. R. 298.

(w) *Reg. v. Carlin, the Salvador*, L. R. 3 P. C. App. 218.

(x) *Re Bright*, 1 U. C. L. J. N. S. 240.

(y) *Ibid.*

(z) *Ibid.*; *Rex v. Salomons*, 1 T. R. 249; *Whitehead v. Reg.* 7 Q. B. 582.

(a) *Re Bright*, 1 U. C. L. J. N. S. 240; *Rex v. Hall*, Cowp. 60.

police magistrate, and condemned," sufficiently shows jurisdiction. (b) A direction to take the prisoner "to the common gaol at Chatham," the warrant being addressed "to the constables, etc., in the county of Kent, and to the keeper of the common gaol at Chatham, in the said county," is sufficient. (c) And the adjudication as to the offence may be by way of recital. (d) The words "to enlist to serve" do not show a double offence, and sufficiently describe that created by the statute; and such a warrant is not bad as to duration or nature of imprisonment.

The commitment for the further time beyond six months should be at hard labor. (e) The statute was intended to allow both fine and imprisonment, or either, and it is not compulsory to award both. So there is power to commit for non-payment of costs. (f) The amount of costs was held to be sufficiently fixed in a warrant of commitment, which, in addition to \$4.50 for costs, proceeded to give all costs and charges of commitment, and conveying the prisoner to gaol, amounting to the further sum of \$1. (g) The statute inflicts a penalty, "with costs," and in such case the costs of conveying the defendant to prison may be lawfully added. (h)

The intent is the material ingredient in the offence under the Act being considered; and the mere fact that arms are on board for the use of a foreign state against a nation at peace with her Majesty, without showing such intent, is no contravention of the Act. (i)

The object of the statute is to prevent warlike enterprises, not commercial adventures. (j) And a steam tug which, in pursuance of an agreement made between its master and the officer in command of a vessel captured as prize, lying in

(b) *Re Smith*, 1 U. C. L. J. N. S. 241.

(c) *Ibid.*

(d) *Ibid.*

(e) *Ibid.*

(f) *Ibid.*

(g) *Ibid.*

(h) *Ibid.*

(i) *The Atalaya*, 7 Q. L. R. 1.

(j) *Ibid.*

British waters, and under the direction of such officer, towed the prize out of British waters for the ordinary towage remuneration, which was afterwards paid by the Consul-General of the belligerent state in London, was held not liable to condemnation, though the master, who was one of the owners of the steam tug, had reasonable cause to believe that the prize was a prize of war, as it could not be said to have been employed in the military or naval service of the belligerent state. (*k*) It would seem, however, that a ship employed in the service of a foreign belligerent state to lay down a submarine cable, the main object of which is, and is known to be, the subserving the military operations of the belligerent state, is employed in the military or naval service of that state, within the meaning of the Act. (*l*) When a cause is instituted against a ship in the Admiralty Court, for an offence under this Act, the court may, with the consent of the Crown, order the ship to be released on bail. (*m*)

Seducing soldiers or sailors to desert.—The Con. Stat. U. C., c. 100, has been repealed, and the 32 & 33 Vic., c. 25, is now the governing enactment on this subject. The Imp. Mutiny Act did not override the Con. Stat. U. C., c. 100; but the latter was passed in aid of the former, and was in force, notwithstanding the Imp. Mutiny Act. The two statutes were construed as if they had been both Canadian, or both English Acts. (*n*) The punishment by fine and imprisonment imposed by the Provincial Act, however, stood abolished as long as the Mutiny Act was in force, and the imprisonment could in no case exceed six calendar months.

The power of trial by the Court of Oyer and Terminer, under the Con. Stat. U. C., c. 100, was not taken away by the Mutiny Act. It was, therefore, held no objection that a defendant had been tried by a Court of Oyer and Terminer, and sentenced to six months' imprisonment, and a fine of

(*k*) *The Gauntlet*, L. R. 3 Ad. & Ec. 381.

(*l*) *The International*, L. R. 3 Ad. & Ec. 321.

(*m*) *The Gauntlet*, L. R. 3 Ad. & Ec. 319.

(*n*) *Reg. v. Sherman*, 17 U. C. C. P. 168, per *J. Wilson, J.*; 169, per *A. Wilson, J.*

10s. imposed ; for this was merely a nominal compliance with the statute, and the court had power to pass the proper judgment, if an improper one had been given. (o)

Although the 32 & 33 Vic., c. 25, in terms gives no power of trial to a Court of Oyer and Terminer, yet section 5 of that statute, by making every offence against it a misdemeanor and punishable as such, would seem to continue the jurisdiction over such cases in that tribunal. The offender may also be convicted in a summary manner before any two justices of the peace, on the evidence of one or more credible witness or witnesses, etc. Nothing in the Act shall be construed to prevent any person being prosecuted, convicted, and punished, under any Act of the Imperial Parliament in force in Canada. (p)

The defendant was indicted under the Con. Stat. U. C., c. 100. s. 2, and convicted of receiving and concealing a deserter from the Royal Navy. The Naval Discipline (Imp.) Act, 29 & 30 Vic., c. 109, s. 25, authorizes a summary conviction before magistrates for this offence ; but the 101st section expressly preserves the power of any court, of ordinary civil or criminal jurisdiction, with respect to any offence mentioned in the Act punishable by common or statute law therefore, a defendant can be indicted and properly convicted under the Provincial Act. (q) Where an indictment charged that the defendant did receive, conceal, or assist "one W., a deserter from the navy," the court inclined to think that this was not sufficiently certain or precise ; for although acts which would prove concealment must involve receiving, and still more certainly assisting, yet there might be acts of assistance quite apart from either concealment or receiving. (r) The Mutiny Act of 1867, 30 Vic., c. 13, has no applicability to the above case. The provisions of that Act

(o) *Reg. v. Sherman*, *supra*, 168-172 ; *Daw v. Metro. Board Co.* 12 C. B. N. S. 161 ; 8 Jur. N. S. 1040.

(p) See also 34 Vic., c. 32 ; 33 Vic., c. 19 ; and 36 Vic., c. 58.

(q) *Reg. v. Patterson*, 27 U. C. Q. B. 142.

(r) *Ibid.*

relate to soldiers, and to others only in regard to their conduct towards those who are soldiers within the meaning of the Act. (s)

A warrant of commitment, in which it was charged that the prisoner, on the 20th June, 1864, "and on divers other days and times," at the city of Kingston, did unlawfully attempt to persuade one James Hewitt, a soldier in Her Majesty's service, to desert, was held bad; for it was impossible to say, upon reading the warrant, how many offences he had committed, or how the punishment was awarded for each specific offence; and if the prisoner were brought up again, he would be unable to say whether he had been tried or not, for he could not tell for which attempt he had already been imprisoned. In this case the court held also that there was no conviction to sustain the warrant of commitment, nor, in fact, any conviction to sustain an imprisonment at all; for if the very words were used in the commitment which were cited in the alleged conviction, the commitment could not be sustained. (t)

When a soldier commits felony, by firing, without orders, on a crowd of people, in the streets of a city, such conduct being insubordinate, unsoldier-like, and to the prejudice of good order and military discipline, he must first be held to answer before the constituted tribunals in the colony proceeding under the common law, before a military court, under the Mutiny Act and the Articles of War, can legally take cognizance of the charge. (u)

A volunteer is liable, by 29 & 30 Vic., c. 12, to be tried by a court martial for misconduct while present at a parade of his corps, though not actually serving in the ranks at the time. (v)

Section 125 of the Imperial Statute 36 Vic., c. 129, does not modify or limit sec. 124 so as to restrict the application

(s) *Reg. v. Patterson*, U. C. Q. B. 144, per *Draper*, C. J.

(t) *Re McGinnes*, 1 U. C. L. J. N. S. 15.

(u) *Ex parte McCulloch*, 4 L. C. R. 467.

(v) *Ex parte Rickaby*, 17 L. C. R. 270.

of that Act in relation to ships in the merchant service of foreign countries to the offence of desertion only, but the whole provisions of the Act apply to such foreign vessels, so far as is consistent with existing treaties between Great Britain and foreign countries. (*w*)

Piracy.—This offence at common law consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there. (*x*) It was not a felony triable by jury at common law, but was made so by the 28 Hy. VIII., c. 15, and 11 & 12 Wm. III., c. 7. (*y*) These two statutes may, perhaps, be treated as in force here, being part of the law of England at the time of its introduction. In Canada, piracy is, in fact, felony committed within the jurisdiction of any Court of Admiralty; for any felony punishable under the laws of Canada, if committed within the jurisdiction of the Admiralty Courts, may be dealt with, inquired of, tried, and determined in the same manner as any other felony committed within that jurisdiction. (*z*)

The Imp. Stat. 12 & 13 Vic., c. 96, extends to the Dominion, and makes further and better provision for the trial of piracy than is made in and by the two former statutes, and may, perhaps, to some extent, supersede them. Commissions were required for the trial of offences under the earlier statutes, but it is conceived that the latter enactment is in itself a sufficient authority for the trial of these offences, and that commissions are now unnecessary. By that statute jurisdiction is given to the colonial courts to try offences cognizable in the Admiralty Court of England, so that in this country the material inquiry in cases of piracy is as to the jurisdiction of the Admiralty Courts.

The admiralty jurisdiction of England extends over British vessels, not only when they are sailing on the high seas, but

(*w*) *Ex parte Johansen*, 18 L. C. J. 164.

(*x*) Russ. Cr. 144.

(*y*) *Ibid.*

(*z*) 32 & 33 Vic., c. 29, s. 136; see also 12 & 13 Vic., c. 96, s. 1.

also when they are in the rivers of a foreign territory, at a place below bridges where the tide ebbs and flows, and where great ships go, although the municipal authorities of the foreign country may be entitled to concurrent jurisdiction. And all seamen, whatever their nationality, serving on board British vessels, are amenable to the provisions of British law. (a)

An American citizen, serving on board a British ship, causing the death of another American citizen, serving on board the same ship, under circumstances amounting to manslaughter, the ship at the time being in the River Garonne, within French territory, at a place below bridges, where the tide ebbed and flowed, and great ships went. It was held that the ship was within the Admiralty jurisdiction, and that the prisoner was rightly tried and convicted at the Central Criminal Court. (b)

On a trial for maliciously wounding on the high seas, it was stated by three witnesses that the vessel on board which the offence was alleged to have been committed was a British ship, of Shields, and that she was sailing under the British flag, but no proof was given of the register of the vessel, or of the ownership. It was nevertheless decided that the court had jurisdiction over the offence—first, because the evidence was sufficient to prove that the vessel was a British vessel; secondly, because, even if it had appeared that the vessel was not registered, the court would still have jurisdiction, as there is nothing in the Merchant Shipping Act to take away that jurisdiction, and also by reason of s. 106 of the latter Act, 1854, which provides that, as regards the punishment of offences committed on board such a ship, she shall be dealt with in the same manner as if she were a recognized British ship. (c)

The prisoner was indicted for stealing three chests of tea

(a) *Reg. v. Anderson*, L. R. 1 C. C. R. 161; 38 L. J. (M. C.) 12; and see *Reg. v. Lopez*, 1 Dears. & B. 1 C. C. 525; *Reg. v. Lesley*, 1 Bell, C. C. 220.

(b) *Reg. v. Anderson*, *supra*; and see *Reg. v. Allen*, 1 Mood. C. C. 494.

(c) *Reg. v. Seberg*, L. R. 1 C. C. R. 264; 39 L. J. (M. C.) 183.

from a vessel, which sailed from London, on the high seas, when the vessel was lying off Wampa, in China. The vessel lay twenty or thirty miles from the sea. No evidence was given of the flowing of the tide, or otherwise, where the vessel lay. On a case reserved, the court held that the offence was within the Admiralty jurisdiction. (*d*) Where the sea flows in between two points of land in England, a straight imaginary line being drawn from one point to the other, the courts of common law have jurisdiction of all offences committed within that line, though it is said the Admiralty has concurrent jurisdiction within the same. (*e*)

The great inland lakes of Canada are within the Admiralty jurisdiction, and by the Imp. Act 12 & 13 Vic., c. 96, there is authority in our courts and magistrates to take cognizance of an offence committed in the lakes, although in American waters, in the same manner as if committed on the high seas. The power may be exercised by all magistrates in the colony, as if the offence had been committed in the waters within the limits of the colony, and within the limits of the local jurisdiction of the courts of criminal justice in the colony; (*f*) for there is nothing in the statute to give any particular functionary jurisdiction, or to make the offence of a local nature, and, therefore, any magistrate in the province may act. (*g*) If a robbery be committed on lakes, harbors, ports, etc., in foreign countries, the Court of Admiralty indisputably has jurisdiction. (*h*)

A British court has no jurisdiction to punish a foreigner for an offence committed on the high seas in a foreign ship, against a British subject. (*i*) The 32 & 33 Vic., c. 20, s. 9, makes provision for the trial in Canada of offences amounting to murder or manslaughter committed upon the sea. (*j*)

(*d*) *Rex v. Allen*, 7 C. & P. 664; *Reg. v. Sharp*, 5 U. C. P. R. 138, per A. Wilson, J.

(*e*) *Ibid.* 139, per A. Wilson, J.; *Rex v. Bruce*, R. & R. 243.

(*f*) *Reg. v. Sharp*, 5 U. C. P. R. 135.

(*g*) *Ibid.* 140, per Wilson, J.

(*h*) *Ibid.* 139, per Wilson, J.

(*i*) *Reg. v. Kinsman*, 1 James, 62.

(*j*) See also c. 29, s. 9.

Customs and Excise offences.—These offences are now regulated by the 40 Vic. c. 10. (*k*) Although section 81 of that Act provides that persons removing goods from a bonded warehouse shall incur the penalties imposed on persons for smuggling, and by s. 76 of the same Act, smuggling is made a misdemeanor, punishable by a penalty not exceeding \$200, or by imprisonment for a term not exceeding one year, or by both, yet an indictment will not lie under s. 81, for the misdemeanor created by s. 76, for the 81st section does not declare that the parties offending, etc., shall be deemed guilty of the misdemeanor created by the 76th, and the clause cannot be extended to the creation of a new crime by implication. (*l*) It is unnecessary to allege, in the indictment for offences against this Act, that the warehouse is a customs warehouse, or one duly appointed and established according to the provisions of the law; for the meaning of the word "warehouse" is clearly defined by the Customs Act, and it would be matter of proof as to whether the building alluded to comes within that definition or not. Nor is it necessary to allege that the goods had been marked and stamped in accordance with the requirements of the Act, for the security of the revenue of Canada, nor that the goods had previously been duly entered for warehousing, in accordance with the provisions of law, nor to allege by whom the goods were kept in the warehouse, for not one of these statements is required by the statute; and, moreover, in official matters, all things are presumed to have been properly done. An allegation that the goods were fraudulently removed implies sufficiently that they were not legally cleared from, etc. (*m*)

On a statute somewhat similar to the 40 Vic., c. 10, s. 91, subsec. 2 (using, however, the words "information on oath shall be given"), it was held that, to justify the breaking open of a building, there should have been, first, a written informa-

(*k*) See as to customs 31 Vic., chs. 5, 6, 7, 43 & 44; also 33 Vic., c. 9; and 34 Vic., chs. 10 and 11.

(*l*) *Reg. v. Bathgate*, 13 L. C. J. 299.

(*m*) *Ibid.*

tion on oath ; and, second, the actual presence of the justice at the breaking, so that the parties may understand the demand for admittance comes from the justice, by virtue of his legal authority, and magisterial character. (n)

Not opening a door, after a proper demand, is a sufficient denial within the Act. If the breaking open is unlawful, and the officer is concerned therein, he cannot justify the seizure of smuggled goods found within the building ; but if a party, not concerned in the unlawful breaking, seized the goods, the case might be different. It seems that an order to enter given to a police officer, present with the revenue officer, would be sufficient, and that he would be presumed to be acting in aid. (o) If the door be closed, and admission denied, then the Act clearly intends that the justice should be the person to demand admittance, and to declare the purpose for which the entry is demanded. Possibly he might do this by the mouth of the officer, but it should be done in such a way as to be well understood as coming from the justice, by virtue of his legal authority and magisterial character. (p)

An indictment for smuggling, under the (N. B.) Rev. Stat., c. 29, s. 1, charged, in the several counts (1) that the defendant unlawfully landed alcohol, subject to duty, and thereby smuggled the same ; (2) that defendant unlawfully landed alcohol, subject to duty, without reporting to the treasurer, and thereby smuggled, etc. : (3) that the defendant landed the alcohol without a permit, and thereby smuggled ; and (4) that the defendant landed alcohol without paying the duties. The indictment was held insufficient, as (1) the mere unlawful landing of goods, without alleging any intent to defraud the revenue, did not constitute the offence of smuggling ; (2) merely landing goods, without reporting them to the treasurer, or without obtaining a permit, though it may subject the party to a penalty, does not amount to smuggling ; (3) and the mere landing of goods, without a previous payment of duty, is not

(n) *Reg. v. Walsh*, 2 Allen, 387.

(o) *Ibid.*

(p) *Ibid.* 391, per Carter, C. J.

a breach of the revenue laws, as the duty may be secured as pointed out in the Act. The indictment must negative the fact that the duties were secured. (*q*)

The colonial legislature has power to impose additional grounds of forfeiture, for breach of the revenue laws, on goods subject to forfeiture, under an Act of the Imperial Parliament. (*r*)

In the *Atty. General v. Warner*, (*s*) the question was raised, but not decided, whether an information would lie under the 66th clause of the Imp. Act 8 & 9 Vic., c. 93, where the party informed against was a person shown not to have transported or harbored the goods of another, but his own goods. smuggled by himself, on his own account.

By this stat. 8 & 9 Vic., c. 93, gunpowder is prohibited from being imported into the British possessions in America, except from the United Kingdom, or some British possession. Gunpowder coming from a foreign country was held not liable to be proceeded against as a non-enumerated dutiable article under the Provincial Revenue Act, 11 Vic., c. 1, for being imported into the Province, at a place not a port of entry, contrary to the Act 11 Vic., c. 2, s. 21; but that it was liable to seizure and forfeiture, under the 17th section of that Act, for being landed without entry at the Treasury. (*t*) Spirits in casks less than 100 gallons were also held liable to forfeiture, under the (N.B.) 11 Vic., c. 67, though the vessel in which they were imported is over 30 tons register. (*u*)

In an information for the condemnation of goods as illegally imported, it is allowable, under a plea that they were not imported *moda et forma*, to show that the goods were landed through stress of weather. (*v*)

In an information, at the suit of the Crown, for goods seized at the Custom House, there must have been a substan-

(*q*) *Reg. v. Cassidy*, 4 Allen, 623.

(*r*) *Atty. Genl. and Myers*, 2 Allen, 493.

(*s*) 7 U. C. Q. B. 399.

(*t*) *Ibid.*

(*u*) *Atty. Genl. v. Walsh*, 2 Allen, 457.

(*v*) *Atty. Genl. v. Spafford, Draper*, 320.

tive allegation that the goods were imported and brought in in violation of the Custom House regulations. (w) It has been held that the omission of the words "against the form of the statute" is fatal. (x) The omission of these words is probably cured by the 32 & 33 Vic., c. 29, s. 23.

In an information for a penalty under the Customs Act, 3 & 4 Wm. IV., c. 59, for knowingly harboring smuggled goods, it was held that the *scienter* was a proper question for the jury; and that in such information, the particular illegal act, as that the goods were imported without payment of duties, etc., should be specified; and that the information should expressly show that the offence charged to have been committed was contrary to the form of the statute, and that saying merely that the statute gives a right to the penalty was not enough. (y)

If a quantity of smuggled goods be purchased at one time, but seizures of them are made at different times, only one penalty for harboring them can be recovered. (z)

An entry at the Custom House declared that the packages contained articles not subject to duty, but some of them contained contraband goods. This was held but one entry, and that being false as to some of the packages, the goods were not duly entered, and the whole were forfeited under the (N.B.) 1 Rev. Stat., c. 27, s. 10. (a)

A revenue inspector, suing in the Queen's name for penalties under the 14 & 15 Vic., c. 100, was held not liable for costs, because he came within the ordinary common law rule, exempting the Crown from costs. (b)

The 34 Vic., c. 11, was passed for the purpose of preventing corrupt practices in relation to the collection of the revenue.

Excise.—The excise is at present regulated by 31 Vic., c. 8, as amended by 40 Vic., c. 12, and by the various statutes in

(w) *Solr. Genl. v. Darling*, 2 L. C. R. 20.

(x) *Ibid.*

(y) *Reg v. Aumond*, 2 U. C. Q. B. 166.

(z) *Ibid.*

(a) *Reg. v. Southward*, 3 Allen, 387.

(b) *Ex parte Hogue*, 3 L. C. R. 287.

force in the several provinces in relation to the sale of liquors.

An indictment under sec. 143 of the first mentioned statute for breaking a lock, etc., after other statements, alleged: In which said warehouse certain goods for and in respect of which a certain duty of excise was then and there by law imposed, were then and there kept and secured, without the knowledge and consent of the collector of inland revenue. It was held that the redundant expression, "were then and there kept and secured," made the words which form the gist of the offence, "without the knowledge and consent of the collector of inland revenue," apply apparently not to the opening of the lock, but to the keeping and securing of certain goods in the warehouse, and was therefore bad. (c) The indictment need not show the description of goods, nor that they are subject to excise, nor by whom the goods were kept and secured, nor that the goods were retained in any warehouse, under the supervision of any officer of inland revenue, nor that defendant opened a lock attached to a warehouse in which goods were so retained, nor that the excise duty was then and there unpaid, for all these allegations are mere surplusage. (d)

A deputy revenue inspector may validly sign a plaint or information for selling liquor without a license. (e) The prosecutor is not bound to prove that the defendant has no license, as he is not called on to prove a negative. (f)

It seems the Crown is not obliged, under Acts relating to the excise, to proceed in the manner prescribed therein as a private individual would be, unless expressly included, but may institute proceedings in the superior courts by information. (g)

(c) *Reg. v. Bathgate*, 13 L. C. J. 303.

(d) *Ibid.* ; see also as to excise 31 Vic., ca. 49 & 50 ; 33 Vic., c. 9 ; and 34 Vic., c. 15.

(e) *Reynolds and Durnford*, 7 L. C. J. 228.

(f) *Ex parte Parks*, 3 Allen, 237 ; see post Evid ; *re Barrett*, 28 U. C. Q. B. 561, per A. Wilson, J.

(g) *Reg. v. Taylor*, 38 U. C. Q. B. 183, per A. Wilson, J.

In prosecutions for selling liquor without license, the better opinion seems to be that the information should be under oath, even where the statute does not expressly require it. (*h*)

If a form of conviction is given in the statute under which the prosecution is had, it is sufficient if that form be followed, even though, from a technical point of view, it is defective. (*i*) But, in the absence of such statutory guide, great care is required in the preparation of a conviction. It should show whether the offence is for selling without license, or during prohibited hours, or in illegal quantities; (*j*) if for selling "by retail" it should so state it; (*k*) if for selling during prohibited hours, or not keeping up a proper signboard, should aver that the defendant was properly licensed. (*l*) It seems the time, (*m*) place, (*n*) and to whom sold, (*o*) should also be stated; and if there are any exceptions in the Act, they should be negatived. (*p*) If for a second or third offence, the previous convictions should be recited and proved. (*q*) But it is not necessary to give the statute under which the conviction takes place, (*r*) nor the kind or quantity of liquor sold. (*s*)

The terms "spirituous liquor" and "intoxicating liquors" are convertible; (*t*) and "at" the hotel, is equivalent to "therein

(*h*) *Reg. v. McConnell*, 6 U. C. Q. B. O. S. 629; but see *ex parte Cousine*; 7 L. C. J. 112.

(*i*) *Reid v. McWhinnie*, 27 U. C. Q. B. 289; *Reg. v. Strachan*, 20 U. C. C. P. 182.

(*j*) *Reg. v. Hoggard*, 30 U. C. Q. B. 152; *ex parte Woodhouse*, 3 L. C. R. 93.

(*k*) *Ex parte Hebert*, 18 L. C. J. 156.

(*l*) *Reg. v. French*, 34 U. C. Q. B. 403; *ex parte Birmingham*, 2 P. & B. 564; *McGilvery v. Gault*, 1 P. & B. 641.

(*m*) *Reg. v. French*, 2 Kerr, 121; but see *Reg. v. Justices of Queen's*, 2 Pugaley, 485.

(*n*) *Ex parte Hebert*, 18 L. C. J. 156.

(*o*) *Reg. v. Cavanagh*, 27 U. C. C. P. 537; but see *Reg. v. Strachan*, 20 U. C. C. P. 182.

(*p*) *Re Mills*, 9 U. C. L. J. 246; *Reg. v. White*, 21 U. C. C. P. 354; *Reg. v. Jukes*, 8 T. R. 542; *Reg. v. White*, 21 U. C. C. P. 354.

(*q*) *Reg. v. French*, 34 U. C. Q. B. 403; *Reg. v. Justices of Queen's*, 2 Pugaley, 485.

(*r*) *Reg. v. Strachan*, *supra*; *Wray v. Toke*, 12 Q. B. 492; *Rex v. Woodcock*, 7 East, 146.

(*s*) *Reg. v. King*, 20 U. C. C. P. 246.

(*t*) *Reid v. McWhinnie*, 27 U. C. Q. B. 289.

or on the premises thereof." (u) A conviction which described the defendant as one "G. P. an innkeeper" was held bad, the word "innkeeper" amounting only to a description of the person, and not to an averment of his filling such a character; and the words "in and at his tavern" are held not to supply the deficiency, as those words are consistent with ownership without occupancy. (v) A conviction for that one H., on, etc., "did keep his bar-room open, and allow parties to frequent and remain in the same, contrary to law," was held clearly bad as showing no offence. (w)

Where the statute limits the time within which proceedings under it are to be taken, it is sufficient if it appear from the statements in the conviction to have been begun in time without any averment of the fact. (x) The information is the commencement of proceedings for this purpose. (y) Under R. S. Ont., c. 181, it would seem to be unnecessary to show such fact, as the clause of limitation is entirely distinct from those creating the offences and imposing the penalties. (z)

A conviction which imposes a fine in excess of that allowed by the statute under which it is made, is bad. (a)

An information charging several offences in the disjunctive is bad, and the defect will not be cured by the confession of the defendant. (b) The charge in a conviction must be certain, and so stated as to be pleadable in the event of a second prosecution for the same offence. (c)

The conviction must be of the offence charged in the information, and not of a different offence, or of several offences in the conjunctive, charged in the disjunctive. (d) Therefore,

(u) *Reg. v. Cavanagh*, 27 U. C. C. P. 537.

(v) *Reg. v. Parlee*, 23 U. C. C. P. 359.

(w) *Reg. v. Hoggard*, 30 U. C. Q. B. 152.

(x) *Reid v. McWhinnie*, 27 U. C. Q. B. 289.

(y) *Reg. v. Lennox*, 34 U. C. Q. B. 28.

(z) *Reg. v. Strachan*, 20 U. C. C. P. 182; *Wray v. Toke*, 12 Q. B. 492; *Rex v. Woodcock*, 7 East, 146.

(a) *Reg. v. Lennox*, 26 U. C. Q. B. 141; *Reg. v. French*, 34 U. C. Q. B. 408.

(b) *Ex parte Hogue*, 3 L. C. R. 94.

(c) *Reg. v. Hoggard*, 30 U. C. Q. B. 152.

(d) *Ex parte Hogue*, 3 L. C. R. 94.

a conviction adjudging the defendant guilty of the several offences therein enumerated, and condemning him "for his said offences" to but one penalty, is bad; (e) and a conviction against two jointly is bad, nor can one penalty be awarded against two jointly, and such a conviction cannot be amended. (f) A conviction will lie against a partner alone for selling liquor without license, for all torts are several as well as joint. (g)

When a conviction concludes *contra formam statuti*, it should first show something done which is contrary to the statute, and the conclusion should follow properly from the premises, otherwise a criminal charge would contain no certainty at all. (h)

A conviction under 40 Geo. III., c. 4, for selling liquor without license, was quashed, because, among other reasons, it directed the defendant to pay the costs of the prosecution, without specifying the amount. (i) But it was no objection, under the 29 & 30 Vic., c. 51, s. 254, that the costs of conveying the defendant to gaol, in the event of imprisonment in default of distress, were specified. (j)

It is no ground for quashing a conviction that the information stated the offence to be "selling liquor without license" without the word "spirituous" or other word descriptive of the quality of the liquor; (k) but it has been doubted whether such a clause would be sufficient in the conviction. (l)

It is no objection to state the offence as selling to divers persons unknown to the informant, provided sales to particular persons be proved; (m) at any rate, if no objection be taken by the prisoner to the variance; (n) and the statute as to variances (o) would likely aid such defect.

(e) *Ex parte Hogue*, 3 L. C. R. 94.

(f) *Reg. v. Sutton*, 42 U. C. Q. B.

(g) *Mullins and Bellamere*, 7 L. C. J. 228.

(h) *Wilson v. Graybiel*, 5 U. C. Q. B. 229, per *Robinson*, C. J.

(i) *Rex v. Ferguson*, 3 U. C. Q. B. O. S. 220.

(j) *Reid v. McWhinnie*, 27 U. C. Q. B. 289.

(k) *Reg. v. Harshman*, 1 Pugsley, 317.

(l) *Campbell v. Flewelling*, 2 Pugsley, 403.

(m) *Reg. v. Harshman*, *supra*.

(n) *Ibid.*

(o) 32 & 33 Vic., c. 31, s. 5.

The exact day of selling need not be stated in the conviction. (*p*)

Costs of commitment or conveying to gaol can only be imposed when expressly authorized by statute; and a conviction granting such costs without authority is bad. (*q*) So a conviction imposing, in default of fine, imprisonment without legislative authority, would be quashed. (*r*)

A conviction for selling, &c., contrary to the Acts of Assembly, and stating the titles of the Acts, is sufficiently certain, one statute rendering the selling illegal and the other imposing the penalty. (*s*)

An order of justices to condemn liquor with packages, &c. is indivisible, and if bad in part, is bad altogether. (*t*) The Ontario Act 44 Vic., c. 27, s. 9, if constitutional, authorizes the destruction of the vessels containing the liquor as well as the liquor itself.

Magistrates cannot, where a formal existing license is produced, go behind it for the purpose of inquiring whether certain preliminary requisites have been complied with before its issue. (*u*) And the quashing of a by-law under which a certificate has been granted, does not, it seems, nullify a license issued under it. (*v*)

Where the licensee to sell "in and upon the premises known as," &c., carried on the business of a tavern keeper in a house at the front of a deep lot, for which house such license was granted, was held properly convicted of selling liquor without license on the lot in rear, which had for many years been used as a fair ground. (*w*)

It is within the competence of the local legislatures to impose penalties for selling liquor without license, though

(*p*) *Reg. v. Justices of Queen's*, 2 Pugsley, 485.

(*q*) *Reg. v. Harshman*, *supra*.

(*r*) *Ex parte Slack*, 7 L. C. J. 6.

(*s*) *Reg. v. Harshman*, 1 Pugsley, 317.

(*t*) *Ex parte Breeze*, 3 Allen, 390.

(*u*) *Reg. v. Stafford*, 22 U. C. C. P. 177.

(*v*) *Ibid.*

(*w*) *Reg. v. Palmer*, 46 U. C. Q. B. 262.

they may be restricted as to the modes of enforcing them. (x) But where the means provided for the recovery of such penalties are *ultra vires*, the statute is void only to the extent of such excess. (y) In the Province of Ontario the sale of liquor is at present regulated by R. S. O., c. 181, as amended by 44 Vic., c. 27. The former statute consolidates and amends the previous enactments on the subject, and makes ample provision for amending and upholding convictions defective in point of form. It also contains clauses regulating the evidence necessary to be adduced in order to procure a conviction; and gives, moreover, civil remedies to persons suffering as a result of the improper supply of liquor to relatives and others.

Several cases have been decided under this statute and those which it embodies, the results of which are given below.

Under s. 52, R.S.O. 181, the previous offence need not be against the same license. That statute only authorizes the alternative of fine or imprisonment for second offence, but gives no power to imprison at hard labor for non-payment of fine; and a conviction bad in this respect cannot be amended under s. 77, as it cannot be said that any other punishment was intended. (z)

A brewer, licensed as such by the Government of Canada under 31 Vic., c. 8, requires no license under above statute. (a)

It was held that 40 Vic., c. 13, the provisions of which are in the main embodied in the R. S. O., c. 181, must be construed either as providing that a wholesale license must be taken out in municipalities where the Temperance Act of 1864 was in force, for the quantities to be sold therein under that Act; and making a sale thereof without license a contravention of secs. 24 & 25 of 37 Vic., c. 32, as a selling by wholesale without license; or as providing in addition that a sale in such municipalities of the quantities prohibited by the

(x) *Reg. v. McMillan*, 2 Pugsley, 110.

(y) *Ibid.*

(z) *Reg. v. Black*, 43 U. C. Q. B 180.

(a) *Severn v. Reg.*, 2 S. C. R. 70; *Reg. v. Scott*, 34 U. C. Q. B. 20.

Temperance Act should be a contravention of the said secs. 24 & 25 as a selling by retail without license. (b)

A conviction for an offence falling within the Canada Temperance Act of 1864, improperly had under the Ont. 32 Vic., c. 32, was amended under 29 & 30 Vic., c. 50. (c) And it has been held that, after a first conviction has been returned to the Sessions, and filed, the justices, if they think it defective, may make out and file a second. (d)

Section 51 of R. S. O., c. 181, which imposes the penalties, omits all reference to a third offence (which was provided for in the enactments of which it is a consolidation), though such an offence is referred to in sec. 73, which deals with the procedure, and in the forms of conviction given by the Act. A conviction, therefore, for a third offence was quashed, although the penalty imposed thereby might have been inflicted for a second offence. (e) This omission is, however, supplied by 44 Vic., c. 27, s. 5.

The servant of a keeper of an unlicensed tavern may be convicted of selling in his master's absence; (f) and a married woman, the lessee of premises where her husband sold liquor, was held liable to conviction though not present when the sale took place. (g)

The competency of the local legislature to delegate to the commissioners power to regulate the number of licenses, or otherwise to legislate with regard to the liquor traffic, has been doubted. (h)

The purchaser of liquors is a competent witness to prove its sale. (i)

A conviction of a registered druggist for selling spirituous

(b) *Reg. v. Lake*, 43 U. C. Q. B. 515.

(c) *Re Watts*, 5 U. C. P. R. 287.

(d) *Wilson v. Graybiel*, 5 U. C. Q. B. 227; *Chancey v. Payne*, 1 Q. B. 712.

(e) *Reg. v. Frawley*, 45 U. C. Q. B. 227.

(f) *Reg. v. Williams*, 42 U. C. Q. B. 462; *Reg. v. Howard*, 45 U. C. Q. B. 346; *Reg. v. Campbell*, 8 U. C. P. R. 55.

(g) *Reg. v. Campbell*, *supra*.

(h) *Ibid.*; *Reg. v. Hodge*, 46 U. C. Q. B. 141; *Roberts v. Olimie*, 46 U. C. Q. B. 284.

(i) *Ex parte Birmingham*, 2 Pugaley & B. 564.

and intoxicating liquors by retail, to wit, one bottle of brandy to one O. S., at and for the price of \$1.25 without having a license so to do as by law required, the said spirituous and intoxicating liquor being so sold for other than strictly medicinal purposes only was held valid, for the defendant was not as a druggist authorized to sell without license, and it was unnecessary for the prosecutor to show that he was not licensed, or to negative any exemption or exceptions. (j) But such conviction should aver that the sale was not made on a requisition for medicinal purposes. (k)

Sec. 55 of R. S. O., c. 181, is within the competence of the local legislature. (l)

An information under sec. 43, for selling liquor on Sunday, is for a crime within R. S. O., c. 62, so as to render the defendant incompetent as a witness. (m)

Section 83 applies where the act complained of was done either by the occupant or by some other person. (n)

Under the Canada Temperance Act, 1878, it has been held necessary to prove before the magistrate that the second part of the statute is in force, by the production of the gazette containing the proclamation; (o) but it may well be doubted whether the court would not be found as a matter of law to take notice whether such proclamation has issued.

Cartierari, on proceedings under this Act, is taken away, (p) except in cases of want or excess of jurisdiction. (q)

It must be shown that the licenses have expired. (r)

Costs may be awarded on conviction. (s)

The Quebec License Act, 34 Vic., c. 2, is constitutional. (t)

(j) *Reg. v. Denham*, 35 U. C. Q. B. 503.

(k) *Reg. v. White*, 21 U. C. C. P. 354.

(l) *Reg. v. Beardman*, 30 U. C. Q. B. 553; see also *Reg. v. Mason* 17 U. C. C. P. 534.

(m) *Reg. v. Roddy*, 41 U. C. Q. B. 291.

(n) *Reg. v. Breen*, 36 U. C. Q. B. 84.

(o) *Ex parte Russell*, 4 Pugsley & B. 536.

(p) *Ex parte Orr*, 4 Pugsley & B. 67.

(q) *Ex parte Russel*, *supra*.

(r) *Ex parte McDonald*, 4 Pugsley, & B. 542; *ex parte White*, 4 Pugsley & B. 552.

(s) *Ibid.*, per *Palmer*, J.

(t) *Ex parte Duncan*, 4 *Revue Leg.* 228; 16 L. C. J. 188.

There was no penalty which could be inflicted on a tavern-keeper for allowing gambling in his house under the above statute; (u) this omission, however, is supplied by the 36 Vic., c. 3, s. 18.

In an action for recovery of a fine under sections 245 and 246 of the above Act, it is sufficient to allege and prove the giving of drink by the candidate to an elector, without alleging or proving the existence of any improper motive. (v)

On a prosecution for a penalty for selling liquors without license, proof that the sale was made by a person in the defendant's shop in his absence, and without showing any general or special employment of such person by the defendant in the sale of liquors, was held in one case sufficient *prima facie* evidence against him. (w)

Under the Quebec License Act, which constitutes a tribunal of two justices, it has been held that a conviction by three is bad; (x) and a conviction for selling liquor in the house of another has, in the same province, been held bad. (y)

No appeal lies to the Queen's Bench on a conviction by two justices under the Quebec License Act. (z)

The quashing of a by-law under which a certificate has been granted, and license issued for the sale of spirituous liquors, does not nullify the license under the R.S.O., c. 181; and a conviction for selling without license cannot, therefore, under these circumstances, be supported. (a)

Under this statute, a license to sell spirituous liquors whether by wholesale or retail, is now necessary, either in the case of a tavern or a shop; and in the case of a shop, it must not be consumed on the premises, or sold in quantities less than a quart. Therefore, the sale of a bottle of gin, without license, is contrary to law; and it would seem that even if a

(u) *Boivin v. Vigneux*, 4 *Revue Leg.* 704.

(v) *Philibert v. Lacerte*, 3 *Que. L. R.* 152.

(w) *Ex parte Parks*, 3 *Allen*, 237.

(x) *Re Paige*, 18 *L. C. J.* 119.

(y) *Ibid.*

(z) *Re Pope*, 16 *L. C. J.* 169.

(a) *Reg. v. Stafford*, 22 *U. C. C. P.* 177.

license be necessary only on a sale by retail, the sale of a bottle valued at sixty cents would be a sale by retail. (b)

Under an Imperial statute it was held that the handing of beer, in a mug through an open window of the defendant's premises to a person who, after paying for it, drank it immediately, standing on the highway as close as possible to the window, was not a selling to be consumed on the premises where sold. (c)

Where the conviction is for a fine—as a fine is imposed by s. 51 for the first offence—it is not necessary to specify whether the conviction is for the first or second offence, as, from the punishment awarded, the court would imply the first offence; and as the offence is selling liquor without license, it is not necessary to state to whom the liquor was sold. Section 68 of the Act provides that the magistrate shall proceed in a summary manner, according to the provisions, and after the forms, contained in and appended to the Act of the Parliament of Canada, entitled, "An Act respecting the Duties of Justices of the Peace out of Sessions in relation to Summary Convictions and Orders." It was held, therefore, that the magistrate following a similar Act, in awarding imprisonment in default of distress and commitment, and conveying to gaol, was not acting illegally, and that it was also sufficient for the conviction to follow the forms given by same statute. (d)

A conviction under this statute, alleging that defendant sold spirituous liquors by retail, without license, stating time and place, is sufficient, without specifying kind and quantity, as this is a particular act, and it is enough to describe it in the words of the legislature. (e) Under the statute, the owner of a shop is criminally liable for any unlawful act done therein in his absence by clerk or assistant, as for in-

(b) *Reg. v. Strachan*, 20 U. C. C. P. 182.

(c) *Re Deal*, L. R. 3 Q. B. 8.

(d) *Reg. v. Strachan*, 20 U. C. C. P. 182; *Re Allison*, 10 Ex. 568, per Park, B.; *Moffat v. Barnard*, 24 U. C. Q. B. 499; *Egginton v. Lichfield*, 5 E. & B. 103.

(e) *Re Donnelly*, 20 U. C. C. P. 165; *Reg. v. King*, 20 U. C. C. P. 246.

stance, in this case, for the sale of liquor, without license, by a female attendant. But it would seem, if the act of sale was an isolated one, wholly unauthorized by him, and out of the ordinary course of his business, he would not be liable. (f)

Where the depositions returned to the court by the convicting magistrate, under a *certiorari*, showed that there was no evidence of a license produced before him, while the affidavits filed, on the application to quash, stated that the party had a license in fact, and produced evidence of it before the magistrate, who, moreover, himself swore that he believed a license was produced, but it was either not proved, or given in evidence; it was held that the return to the *certiorari* was conclusive, and that the court could not go behind it. (g)

The informer is a competent witness, as he is expressly made so by the statute; (h) but the defendant cannot be compelled to give evidence against himself. (i)

The penalties imposed by the 3 Vic., c. 47, for selling liquor without license, are recoverable before the mayor of Fredericton, under the Act of Incorporation, 14 Vic., c. 15, s. 67. The mayor, being *ex officio* a justice of the peace, may, in that character, proceed for the penalties which, by the city charter, are made recoverable before the mayor. (j)

Under Con. Stats., L. C., c. 6, the convicting magistrate has a discretionary power of giving any one of the three judgments mentioned in sec. 32, sub.-sec. 2, and secs. 38, 39 and 40. (k)

An appeal lies to the General Quarter Sessions of the Peace from a conviction rendered by a judge of the Sessions of the Peace in and for the city of Montreal, under s. 50 of this statute. (l) Under the same statute, the convicting magistrate has the right to grant costs, either upon conviction or dismissal of the prosecution, and this even to attorneys. (m)

(f) *Re Donnelly*, 20 U. C. C. P. 165.

(g) *Reg. v. Strachan*, 20 U. C. C. P. 182.

(h) *Ibid.*

(i) *Reg. v. Roddy*, 41 U. C. Q. B. 291.

(j) *Reg. v. Allen*, 2 Allenia, 435.

(k) *Ex parte Moley*, 7 L. C. J. 1.

(l) *Ex parte Thompson*, 7, L. C. J. 10.

(m) *Ex parte Moley*, 7 L. C. J. 1.

In an appeal from a conviction for selling liquor contrary to c. 22 of the (N.S.) Rev. Stat., the court allowed the original summons to be amended. (n)

Compounding offences.—Compounding felony is where the party injured, knowing the felon, takes his goods again, or other amends, upon agreement not to prosecute. (o) It is a misdemeanor at common law, punishable by fine and imprisonment. (p)

A prosecution is not the property of those that institute it, to deal with it as they please. The public have a higher interest in having redress rendered, and wrong punished, to deter others from offending in like manner; (q) and in general, a prosecution can only be compromised by leave of the court. A prosecution for selling liquor without license cannot be compromised without the leave of the court. (r) Leave has been granted to compound a *qui tam* action on the 32 Hy. VIII, c. 9, for buying a pretended title, on paying the King's share into court. (s)

It is equally illegal to stipulate for the compromise of a charge amounting to only a misdemeanor, if the offence is one which is injurious to the community generally, and not confined in its consequences to the prosecutor himself, as it is to compromise a charge of felony. (t)

The 18 Eliz, c. 5, contains provisions against compounding informations on penal statutes. But this statute does not extend to penalties which are only recoverable by information before justices. (u)

(n) *Taylor v. Marshall*, 2 Thompson, 10,

(o) Russ. Cr. 194-5.

(p) Arch. Cr. Pldg. 837.

(q) *Reg. v. Hammond*, 9 Solr. Jour. 216, per Bramwell, B.

(r) *Re Fraser*, 1 U. C. L. J. N. S. 326, per A. Wilson, J.; *Reg. v. Mabey*, 37 U. C. Q. B. 248.

(s) *May q. t. v. Dettrick*, 5 U. C. Q. B. O. S. 77. As to stifling a prosecution for felony, and the distinction between it and compounding felony, see *Williams v. Bayley*, L. R. ; 1. E. & L App. 200.

(t) *Dwight v. Ellsworth*, 9 U. C. Q. B. 540, per Robinson, C. J.

(u) *Reg. v. Mason*, 17 U. C. C. P. 534; *Re v. Crisp*, 1 B. & Ald. 282; *Reg. v. Mason*, 17 U. C. C. P. 534; see also *Reg. v. Stone*, 4 C. & P. 379; *Reg. v. Gotley*, R. & R. 84; *Reg. v. Best*, 2 Mood. C. C. 125; Arch. Cr. Pldg. 837; *Macfarlane v. Dewey*, 15 L. C. J. 85; 32 & 33 Vic. c. 21, s. 115.

Offences by persons in office.—An indictment lies against a person who wilfully neglects or refuses to execute the duties of a public office. (v) An indictment may be maintained against a deputy returning officer at an election for refusing, on the requisition of the agent of one of the candidates, to administer the oath to certain parties tendering themselves as voters. (w) But the omission of the name of the agent from such indictment will vitiate it. (x)

An indictment charging a misdemeanor against a registrar and his deputy jointly, is good, if the facts establish a joint offence. A deputy is liable to be indicted, while the principal legally holds the office, and even after the deputy himself has been dismissed from the office. (y)

Extortion signifies the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due. (z) This offence is of the degree of misdemeanor, and all persons concerned therein, if guilty at all, are principals. (a) Two or more persons may be jointly convicted of extortion where they act together and concur in the demand. Where two persons sat together as magistrates, and one of them exacted a sum of money from a person charged before them with a felony, the other not dissenting, it was held that they might be jointly convicted. (b) It is not necessary that the indictment should charge the defendants with having acted corruptly. (c)

The courts do not quash indictments for extortion, but leave the defendants to demur. (d)

The Stat. of West. 3 Edward I., c. 26, would seem to apply here. (e)

(v) *Reg. v. Bennett*, 21 U. C. C. P. 238, per Galt, J.

(w) *Ibid.*

(x) *Ibid.*

(y) *Reg. v. Benjamin*, 4 U. C. C. P. 179.

(z) *Russ. Cr.* 208.

(a) *Reg. v. Tisdale*, 20 U. C. Q. B. 273, per Robinson, C. J.

(b) *Reg. v. Tisdale*, 20 U. C. Q. B. 273, per Robinson, C. J.

(c) *Ibid.*

(d) *Ibid.* 272, per Robinson, C. J.; and see *Rex v. Wadsworth*, 5 Mod. 13.

(e) *Askin v. London District Council*, 1 U. C. Q. B. 292.

As to the fees which may be legally exacted by public officers in different cases, it is a general rule that when a duty is cast upon any one by Act of Parliament, and no remuneration is provided for doing it, the party is to perform the duty without remuneration. (f) A clerk of the peace is an officer serving the Crown, and appointed to discharge public duties, and he cannot charge fees for any service for the remuneration of which no provision is made by statute or otherwise expressly assigned to him by law; (g) for it is a maxim of law that no fee can be demanded for services rendered in the administration of justice, except such as can be shown to have a clear legal origin, either as being specifically allowed in some Act of Parliament, or as being sanctioned by some court or officer that has been permitted by ancient usage to award a fee for the service. (h)

All new offices erected with new fees, or old offices with new fees, are within the Stat. 34 Edward I., for that is tallage upon the subject, which cannot be done without common assent by Act of Parliament. (i) A clerk of the peace is not entitled to any fee from the parties to a cause for striking a special jury. (j) The table of fees established and promulgated by the courts, contains all the services for which clerks of the peace are entitled to charge, except that they are entitled to fees in all cases where such fees are authorized by Act of Parliament; but no local tariff or user in particular counties can give any additional right. (k)

It would be illegal, as manifestly contrary to duty as well as public policy, in a judge to take from the party in whose favor he purposes to decide, an undertaking to indemnify him against all the consequences of his decision. (l)

(f) *Astin v. London District Council*, 1 U. C. Q. B. 295, per Robinson, C. J.; *Graham v. Grill*, 2 M. & S. 293.

(g) *Astin v. London District Council*, 1 U. C. Q. B. 292.

(h) *Hooker v. Gurnett*, 16 U. C. Q. B. 183, per Robinson, C. J.; *Price v. Perceval*, S. L. C. A. 189; the *London S. V. A. R.* 140.

(i) The *London S. V. A. R.* 140.

(j) *Hooker v. Gurnett*, 16 U. C. Q. B. 180.

(k) *Re Dartnell*, 28 U. C. Q. B. 430. See as to auditing accounts of the clerk of the peace, *re Pousett and Corporation of Lambton*, 22 U. C. Q. B. 80.

(l) *Ballard v. Pope*, 3 U. C. Q. B. 320, per Robinson, C. J.

A bailiff for overcharge is liable to fine and imprisonment; (m) but in one case such a conviction was quashed, on the ground that the magistrate permitted an amendment in the information, and because no precise date of the offence was given. (n)

The fees of office and taxes payable to the clerk of appeals, Queen's Bench, belong to, and form part of, the revenue of the Crown. (o)

Sale of offices.—It would seem that an indictment or information lies at common law for the sale of a public office, on the ground that public policy requires that there should be no money consideration for the appointment to any office in which the public are interested, and that the public will be better served by having persons best qualified to fill offices appointed to them; and if money may be given to those who appoint, or through whom an office may be obtained, it would be a temptation to appoint improper persons. (p)

The office of sheriff is an office concerning the administration or execution of public justice, and the sale of it is illegal. The defendant agreed with R., then sheriff of the county of Norfolk, to give him £500, and an annuity of £300 a year, if he would resign. R. accordingly placed his resignation in defendant's hands. The £500 was paid, and certain lands conveyed to secure the annuity; and it was further agreed that in the event of the resignation being returned, and R. continuing to hold the office, the money should be repaid, and the land reconveyed. But R. did not undertake in any way to assist in procuring the appointment for the defendant. The latter having been appointed by the Government in ignorance of the agreement, an information was filed against him, and the court held that this was an illegal transaction, as being, in fact, a purchase of the office, within the 5 & 6 Ed. VI., c. 16, and that an information might be

(m) *Dequire v. Despina*, 6 *Revue Leg.* 736.

(n) *Ex parte Smith*, 6 L. C. R. 486.

(o) *Reg. v. Holt*, 13 L. C. R. 306.

(p) *Reg. v. Mercer*, 17 U. C. Q. B. 625; per *M'Lean*, J.; and see *Russ. Cr.* 214; *Rex v. Vaughan*, 4 Burr. 2494; *Rex v. Pollman*, 2 Camp. 229.

sustained under this Act as for a misdemeanor; but, at all events, if not sustainable under this Act, the British Act 49 Geo. III., c. 126. clearly applied in this Province, and made it a misdemeanor; (q) and it may well be doubted whether the agreement would not have been an offence at common law. (r) The ignorance of the Government as to the illegal agreement was immaterial. (s)

In another case, a sheriff agreed with one O. to give the latter all the fees of his office, except for certain services specified, in consideration of which O. was to pay him £300 a year quarterly in advance, not out of the fees, but absolutely and without reference to their amount. It was held that this was a sale of the deputation of the office, and was clearly prohibited by the 5 & 6 Ed. VI, c. 16, and 49 Geo. III, c. 126, and that the effect of it was to forfeit the office upon conviction under a proceeding by *scire facias*. (t) But if the defendant in this case had agreed to pay his deputy a certain sum of money annually for acting as his deputy, either in regard to all his ministerial duties, or a part of them, or had agreed to give him a certain portion of the fees, or to take from him a certain portion of the fees, or a certain fixed sum annually out of the fees, he would not have brought himself within the statute, or done anything illegal. (u)

The 49 Geo. III, c. 126, expressly extends the 5 & 6 Ed. VI., c. 16, to the colonies; at least such portions of it as are in their nature applicable. (v) The former statute expressly extends the 5 & 6 Ed. VI, c. 16, to the office of sheriff: and any act done in contravention of the latter statute is indictable, though not expressly made so. (w)

An agreement whereby, after reciting that A. had carried on the business of a law stationer at G., and had also been

(q) *Reg. v. Mercer*, 17 U. C. Q. B. 602.

(r) *Ibid.*

(s) *Ibid.*

(t) *Reg. v. Moodie*, 20 U. C. Q. B. 389.

(u) *Ibid.* 402, per *Robinson*, C. J.; see also *Foot v. Bullock*, 4 U. C. Q. B. 480.

(v) *Reg. v. Mercer*, 17 U. C. Q. B. 602.

(w) *Ibid.*

sub-distributor of stamps, collector of assessed taxes, etc., there, and that he had agreed with B. for the sale of the said business, and of all his goodwill and interest therein, to him, for the sum of £300. A, in consideration of the said sum of £300, agreed to sell, and B. agreed to purchase, the said business of a law stationer at G.; and whereby it was further agreed that A. should not, at any time after the first of March then next, carry on the business of a law stationer at G., or within ten miles thereof, or collect any of the assessed taxes, but would use his utmost endeavors to introduce B. to the said business and offices, is illegal and void, as being a contract for the sale of an office within the 5 & 6 Ed. VI., c. 16, and also within the 49 Geo. III., c. 126, which makes the offences prohibited by the former statute misdemeanors. (x)

An arrangement by a clerk of the Crown to resign his office in favor of his son, on condition of sharing the revenues and emoluments of the office, is illegal and void. (y)

The Quarter Sessions is a competent tribunal to hear and determine a charge, under 1 W. & M., c. 21, s. 6, against a clerk of the peace for having "misdemeaned himself in the execution of his office." And when the Quarter Sessions have determined the charge, the superior court cannot question the propriety of their decision. (z)

It seems that the treasurer of a municipality may be indicted for an application of the funds clearly contrary to law, even though sanctioned by a resolution of the council; or for paying a member of the council for his attendance. (a)

A court of justice has power to remove its officers, if unfit to be trusted with a professional *status* and character. If an advocate, for example, were found guilty of crime, there is no doubt the court would remove him. (b)

(x) *Hopkins v. Prescott*, 4 C. B. 578; and see *Reg. v. Charretie*, 13 Q. B. 447.

(y) *Delisle and Delisle*, Dob. Dig. 89.

(z) *Wilkes v. Russell*, 1 L. R. 1, C. P. 722.

(a) *East Nisouri v. Horseman*, 16 U. C. Q. B. 576; see also *Daniels v. Tp. of Burford*, 10 U. C. Q. B. 478.

(b) *Re Wallace*, L. R. 1, P. C. App. 295, per Lord Westbury.

But an advocate who has advised a client to oppose a writ of execution even by force, believing it to be null, cannot be convicted on a criminal information for such advice. (c)

A criminal information will lie against an officer who misconducts himself in the execution of his office. But such an information will never be granted against a judge, unless the court sees plainly that dishonest, oppressive, vindictive or corrupt motives, influenced the mind, and prompted the act complained against. (d)

On an application to file a criminal information against a Division Court judge, for his conduct in imposing a fine, for contempt, upon a barrister employed to conduct a case before him, the court held that, even if his conduct were erroneously treated by the judge as contemptuous, and, consequently, the adjudication of contempt would, on a full and deliberate examination, be found incorrect, this would afford no ground whatever for a criminal information. (e) It has been questioned whether a criminal information is proper in the case of a judge of an inferior court of civil jurisdiction in relation to a matter over which he has exclusive jurisdiction. (f)

An attachment has been granted against commissioners of a Court of Requests, for trying a cause in which they were interested. (g) And where a magistrate acts in his office with a partial, malicious, or corrupt motive, he is guilty of a misdemeanor, and may be proceeded against by indictment or criminal information in the Queen's Bench. (h)

It is a well-established maxim of law that no one shall be a judge in his own cause, and the general rule applicable to judicial proceedings is, that the judgment of an interested judge is voidable, and liable to be set aside by prohibition, error, or appeal, as the case may be. (i) In cases of necessity

(c) *Reg. v. Morrison*, 3 *Revue Leg.* 525.

(d) *Re Recorder and Judge D. C. Toronto*, 23 U. C. Q. B. 376.

(e) *Ibid.*

(f) *Ibid.*; see also *Reg. v. Ford*, 3 U. C. C. P. 209.

(g) *Rex v. McIntyre, Taylor*, 22.

(h) *Burns. Jus.*, vol. iii. 144-5, ed. 13.

(i) *Phillips v. Eyre*, L. R. 6 Q. B. 22, per *Willes, J.*

however, where all the judges having exclusive jurisdiction over the subject matter happen to be interested, the objection cannot prevail. And the objection does not apply to a party claiming the protection of an Act of Parliament, though he is a necessary party to its passing, as the governor of a colony, there being no analogy between judicial and legislative proceedings in this respect. (*j*)

A direct pecuniary interest in the matter in dispute disqualifies any person from acting as a judge in such matter. (*k*) The interest, however, which disqualifies at common law must be direct and certain, not remote or contingent. (*l*) Thus, the corporation of B. were the owners of water-works, and were empowered by statute to take the waters of certain streams, without permission of the mill-owners, on obtaining a certificate of justices that a certain reservoir was completed of a given capacity, and filled with water. An application was made to justices accordingly, which was opposed by mill-owners; but, after due inquiry, the justices granted the certificate. Two of the justices were trustees of a hospital and friendly society respectively, each of which had lent money to the corporation bonds, charging the corporate funds. Neither of the justices could, by any possibility, have any pecuniary interest in these bonds; but the security of their *cestui que trusts* would be improved by anything improving the borough fund, and the granting of the certificate would indirectly produce that effect, as increasing the value of the water-works. There was no ground to doubt that the justices had acted *bona fide*; and the court held that the justices were not disqualified from acting in the granting of the certificate. and the court refused a *certiorari* for the purpose of quashing it. (*m*)

The mere possibility of bias in favor of one of the parties does not *ipso facto* avoid the justice's decision; in order to have that effect, the bias must be shown at least to be real.

(*j*) *Phillips v. Eyre*, L. R. 6 Q. B. 22, per *Willes*, J.

(*k*) *Reg. v. Rand*, L. R. 1 Q. B. 232, per *Blackburn*, J.

(*l*) *Reg. v. M. S. & L. Ry. Co.*, L. R. 2 Q. B. 339, per *Mellor*, J.

(*m*) *Reg. v. Rand*, L. R. 1 Q. B. 230.

But if a judge is really biassed in favor of one of the parties, it would be very wrong in him to act, and it seems the court would interpose in such case. (n)

It seems no objection to a justice that he is remotely connected with one of the parties, so long as there is no consanguinity or affinity. (o)

If a person assault a justice, the latter might, at the time of the assault, order him into custody ; but when the act is over, and time intervenes, so that there is no present disturbance, it becomes, like any other offence, a matter to be dealt with upon proper complaint, upon oath, to some other justice, who might issue his warrant ; for neither a magistrate nor a constable is allowed to act officially in his own case, except *flagrante delictu*, while there is otherwise danger of escape, or to suppress an actual disturbance, and enforce the law while it is in the act of being resisted. (p)

Monopoly.—A by-law passed under 31 Vic., c. 30, s. 44, for exempting from taxation any person commencing any new manufacture of the nature contemplated by the section, and employing therein more than \$1,000, and paying to operators more than \$30 weekly, was held bad, for exempting new manufactures in preference to old-established business, and for exempting only those persons doing a specified amount of business. (q). The giving to one person of a trade a benefit which another of the same trade does not get also, is a monopoly of the worst description ; (r) and a by-law passed for such a purpose would be void.

Rules in restraint of trade are not criminal, though they may be void as against public policy. (s) Nor are strikes necessarily illegal, and their legality or illegality must depend on the means by which they are enforced, and upon their

(n) *Reg. v. Rand*, L. R. 1 Q. B. 233, per *Blackburn, J.* ; *Reg. v. Meyer*, L. R. 1 Q. B. D. 173.

(o) *Reg. v. Comrs. Highways, St. Joseph*, 3 Kerr, 583 ; see also on this subject *Wildes v. Russell*, L. R. 1 C. P. 722 ; *ex parte Leonard*, 1 Allen, 269.

(p) *Powell v. Williamson*, 1 U. C. Q. B. 156, per *Robinson, C. J.*

(q) *Pirie and the Corporation of Dundas*, 29 U. C. Q. B. 401.

(r) *Ibid.* 407, per *A. Wilson, J.*

(s) *Reg. v. Stainer*, L. R. 1 C. C. R. 230, 39 L. J. (M. C.) 54.

objects. They may be criminal, if part of a combination for the purpose of injuring or molesting either masters or men, or they may be simply illegal, as when they are the result of an arrangement depriving those engaged therein of the liberty of action. (*t*)

The Trade Unions Act, 1872, (*u*) (35 Vic., c. 30) declares that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to a criminal prosecution for conspiracy, or otherwise

By 35 Vic., c. 31., D., every person who uses violence to any person, or any property, or threatens or intimidates any person in such a manner as would justify a justice of the peace, on complaint made to him, to bind over the person so threatening or intimidating to keep the peace, or who "molests" or "obstructs" any person in manner defined by the Act, with a view to coerce such person—being a master, to dismiss or cease to employ any workman; or, being a workman, to quit any employment, or return work before it is finished; being a master, not to offer, or, being a workman, not to accept, any employment or work; being a master or workman, to belong to, or not to belong to, any temporary or permanent association or combination; being a master or workman, to pay any fine or penalty imposed by any temporary or permanent association or combination; being a master, to alter the mode of carrying on his business, or the number or description of any persons employed by him—shall be guilty of an offence against the Act, and shall be liable to imprisonment, with or without hard labor for a term not exceeding three months.

Any person shall, for the purposes of this Act, be deemed to molest or obstruct another person in any of the following cases: that is to say, (1) if he persistently follows such other

(*t*) *Farrer v. Close*, L. R. 4 Q. B. 612, per *Hannen*, J.; *Hilton v. Eckersley*, E. & B. 47.

(*u*) 35 Vic., c. 30.

person about from place to place; (2) if he hides any tools, clothes, or other property owned or used by such other person, or deprives him of, or hinders him in the use thereof; (3) if he watches or besets the house or place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place, or if with two or more other persons he follows such other person, in a disorderly manner, in or through any street or road.

By the 32 & 33 Vic., c. 20, s. 42, assaults in pursuance of any unlawful combination or conspiracy to raise the rate of wages, are punishable as misdemeanors.

These statutes, in a great measure, assimilate the law as to trades unions and strikes to that existing in England. Several cases have been decided in England, which may assist in the construction of the Canadian statutes. (*v*)

A by-law of Fredericton, to regulate the public market, required the stalls in the market to be leased annually, and declared that the lessee of a stall should receive from the mayor a license to occupy, and that any person occupying without a license should be liable to a penalty. In a prosecution for the penalty the court held that the only question was, whether the defendant had a license. (*w*)

Champerty and maintenance.—The offence of champerty is defined in the old books to be the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it. (*x*) The object of the law is not so much to prevent the purchase or assignment of a matter in litigation, as such purchase or assign-

(*v*) See *Reg. v. Byderdike*, 1 M. & Rob. 179; *Reg. v. Rowlands*, 2 Den. 364, 17 Q. B. 671; *Reg. v. Duffield*, 5 Cox, 404; *Walsby v. Anley*, 30 L. J. (M. C.) 121; *O'Neill v. Longman*, 4 B. & S. 376; *O'Neill v. Kruger*, 4 B. & S. 389; *Reg. v. Druitt*, 10 Cox, 592, 601-2; *Reg. v. Shepherd*, 11 Cox, 325; *Reg. v. Selsby*, 5 Cox, C. C. 495; *Hilton v. Eckersly*, 6 E. & B. 47-53; 24 L. J. Q. B. 353; *Hornby v. Close*, L. R. 2 Q. B. 153; *Reg. v. Hunt*, 8 C. & P. 642; *Reg. v. Hewit*, 5 Cox, C. C. 162.

(*w*) *Ex parte Milligan*, 2 Allen, 583; see as to forestalling, *Wilson v. Corporation of St. Catharines*, 21 U. C. C. P. 462.

(*x*) *Carr v. Tannahill*, 31 U. C. Q. B. 223, per *Morrison, J.*; *Kerr v. Brunton*, 24 U. C. Q. B. 395, per *Hagarty, J.*; *Stanley v. Jones*, 7 Bing, 369.

ment *with the object* of maintaining and taking part in the litigation. (y) All the cases of champerty and maintenance are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. (z)

The principles of the law of maintenance are recognized and adhered to in the modern cases. (a) But the general doctrines of the law are largely modified, and restrained in their operation to cases where there is danger of oppression or abuse ; (b) or where a man improperly, and for the purpose of stirring up litigation or strife, or of profiting by it, encourages others to bring actions, or make defences, which they have no right to make. (c)

Champerty is punishable at common law. (d) It seems the Crown is bound by the law on this subject. In *Smyth v. M'Donald*, (e) it was held that the Crown must first eject the occupant before selling land of which it is not in possession ; and that neither the 32 Hy. VIII., c. 9, nor the ordinary principles of the common law, allowed the conveyance of such land by the Crown. (f)

The plaintiff having recovered judgment against B. & P. agreed with the defendant that, if such judgment, or any portion of it, should be realized from property to be pointed out by him, the defendant should have one-third of the amount so realized. The agreement further provided that "all costs that may be incurred in endeavoring to make the money to be payable by him (the defendant), if unsuccessful, and the amount of such costs to be the first charge on any proceeds, the net balance to be divided." Goods pointed out by the

(y) *Carr v. Tannahill*, 31 U. C. Q. B. 223, per *Morrison*, J.

(z) *Ibid.* 224, per *Morrison*, J. ; *Prosser v. Edmonds*, 1 Y. & C. 497.

(a) *Carr v. Tannahill*, *supra*, 227, per *Morrison*, J.

(b) *Allan v. M'Heffey*, 1 Oldright, 121, per *Young*, C. J.

(c) *Ibid.* 122, per *Young*, C. J.

(d) *Scott v. Henderson*, 2 Thomson, 116, per *Haliburton*, C. J.

(e) 1 Oldright, 274.

(f) *Scott v. Henderson*, *supra*, 116, per *Haliburton*, C. J.

defendant having been seized, under the plaintiff's execution, were claimed, and, on an interpleader issue, were found to be the claimant's. The plaintiffs thereupon sued defendant upon the agreement for their costs of defence in the interpleader, etc., which they had been compelled to pay. It was held that such agreement, if not champerty, was illegal, as being opposed to public policy and the due administration of justice. (g)

Whether or no there must be a suit pending to constitute maintenance does not seem perfectly clear. The argument employed in *Kerr v. Brunton*, against the agreement being maintenance, was, that no suit was pending about any property, nor was it binding on the plaintiff to bring any suit. The court did not actually decide that the agreement amounted to maintenance in its strict sense, but held that, at all events, it was a great misdemeanor in the nature of the thing, and equally criminal at common law. (h) It would seem, from *Sprye v. Porter*, (i) that the agreement in *Kerr v. Brunton* was maintenance. In the former case, A., in consideration of one-fifth of the property to be recovered, agreed that, in case it should become necessary to institute proceedings at law or in equity, he would furnish such information and evidence as would ensure the recovery of the property; and Lord Campbell characterizes this as "maintenance in its worst aspect," although no proceeding was actually commenced or pending.

The plaintiffs having filed a bill for specific performance of a contract by one R. to sell a certain mine to them, it was agreed between the plaintiffs and T., one of the now defendants, while such suit was pending, that certain persons should purchase said mine from the plaintiffs; that they should deposit the money required for security for costs which the plaintiffs had been ordered to give in said suit, and pay all costs incurred, or to be incurred therein

(g) *Kerr v. Brunton*, 24 U. C. Q. B. 390.

(h) *Wood v. Downes*, 18 Ves. 125.

(i) 7 E. & B. 58.

or any other suit brought or defended by them respecting said mine, and pay all moneys due for the purchase thereof; and, lastly, to allot to each of the plaintiffs a twentieth share therein, if they should succeed in getting a title through the suit, and that they would settle all claims of Messrs. E. & G. against the plaintiffs. The plaintiffs having sued defendants on the last-mentioned covenant, the court held upon demurrer to a plea setting out the transaction, that the agreement was void for champerty and maintenance. (j) But the agreement of T. to purchase the mine, though then in litigation, was not necessarily illegal. (k) The agreement with respect to the costs, that T. should pay them, and carry on the proceedings, was probably illegal. (l) Had T. had any interest in the property at the time of the purchase from the plaintiffs, the purchase or prosecution of the suit would not have been illegal; (m) or had he then had a claim which he believed gave him an interest in the property. (n)

A sharing in the profits derived from the success of the suit is essential to constitute champerty. (o) The plaintiff agreed with a solicitor to give him a portion of the profits arising from the successful prosecution of a suit to establish his right to certain coal mines, upon being indemnified against the costs of the proceedings, and the court held that the contract amounted to champerty and maintenance. (p)

After verdict and before judgment, a plaintiff in ejectment assigned the subject-matter of the suit to his attorney, as a security for money advanced by the attorney in carrying on the suit and for other purposes, and for the

(j) *Carr v. Tannahill*, 31 U. C. Q. B. 217.

(k) S. C. 31 U. C. Q. B. 209, per *Wilson, J.*; *Harrington v. Long*, 2 M. & K. 593.

(l) *Carr v. Tannahill*, 31 U. C. Q. B. 209, per *Wilson, J.*; *Hunter v. Daniel*, 4 Hare, 431.

(m) *Ibid.* 420-430.

(n) *Findon v. Parker*, 11 M. & W. 675; *Carr v. Tannahill*, *supra*, 210, per *A. Wilson, J.*

(o) *Hartley v. Russell*, 2 S. & St. 244-252; *Carr v. Tannahill*, *supra*, 210, per *Wilson, J.*

(p) *Hilton v. Woods*, L. R. 4 Eq. 432.

amount due to him for his professional services. It was held, affirming the judgment of the Queen's Bench, that the assignment was not void as against public policy, or by reason of any of the statutes against champerty and maintenance; (q) for the contract was confined to the payment of a debt already due for costs subject to taxation; and, therefore, the attorney got nothing but a security for a just debt.

A conveyance, whether voluntary, or for valuable consideration of property which the grantor has previously conveyed by deed, voidable in equity, is not void on the ground of champerty. (r) An agreement by a shareholder in a company which is being compulsorily wound up, that, in consideration of a pecuniary equivalent, he will support the claim of a creditor, comes within the rule of law against maintenance, because it is to uphold a claim to the disturbance of common right. (s)

The 32 Hy. VIII., c. 9, as to selling pretended titles, is in force here. (t) The intention of this statute, and the ground of the principle of the common law, which is said to be fully in accordance with it, was that a person claiming a right which he knew to be disputed, should not sell a mere law-suit, but should first reduce the right to possession and then sell. (u) A person cannot be convicted on this statute merely upon his own admission that he has taken a deed from a party out of possession. Some evidence *aliunde* must be adduced of the existence of such deed. (v)

Buying an equity of redemption in a mortgaged property, of which the person selling has been out of possession for many years, is not buying a disputed title within the statute. (w)

(q) *Anderson v. Radcliffe*, 7 U. C. L. J. 23 (Ex Chr.) E. B. & E. 806-819.

(r) *Dickenson v. Burrell*, L. R. 1 Eq. 337.

(s) *Elliott v. Richardson*, L. R. 5 C. P. 748, per Willes, J.

(t) *Ante* p. 8.

(u) *Ross q. t. v. Meyers*, 9 U. C. Q. B. 288, per Robinson, C. J.

(v) *Aubrey q. t. v. Smith*, 7 U. C. Q. B. 213.

(w) *M'Kenzie v. Miller*, 6 U. C. Q. B. O. S. 459.

In the province of Ontario by the R. S. O., c. 98, s. 5, the 32 Hy. VIII., c. 9, is to some extent repealed, and a person selling a right of entry is protected from the penalties imposed by the 32 Hy. VIII., c. 9; for he can no longer be looked upon as selling a pretended right, when the law allows such right to be the subject of legal conveyance. (x) But it would seem that the statute is only repealed to the extent of permitting a man to sell and convey a right of entry which is actually subsisting in himself, and that the sale of a pretended right which does not in fact exist is still within the statute. (y) Moreover, the R. S. O., c. 98, applies only to rights of entry as on a disseizin. (z)

The R. S. O., c. 116, s. 7, renders choses in action assignable at law. This enactment conflicts in principle with the 32 Hy. VIII., c. 9, and it may be questioned whether a conviction would now be had under it.

Bigamy.—It might be contended from the language of the 32 & 33 Vic., c. 20, s. 58, that it only applies to the case of a second marriage, and that the offence of polygamy, in its ordinary acceptation, is not comprehended within its provisions. Assuming that under this statute a person guilty of polygamy cannot relieve himself from the penalties attaching to bigamy, it may be a question, in the event of a plurality of marriages, to which of them proof should be directed; whether any two of them, or the first and second, or all.

The 4 Ed. VI., stat. 3, c. 5, and 1 Jac. I., c. 11, may perhaps apply here, except in so far as they are superseded by the Colonial Act.

On trials for bigamy, the guilt or innocence of the defendant depends upon the legality of the first marriage; and before the jury can convict him they must clearly see that a prior legal marriage has in fact taken place. (a) It seems

(x) *Baby q. t. v. Watson*, 13 U. C. Q. B. 531.

(y) *Ibid.*

(z) *Hunt v. Bishop*, 8 Ex. 675; *Hunt v. Remnant*, 9 Ex. 635; *Bennett v. Herring*, 3 C. B. N. S. 370.

(a) *Breakey v. Breakey*, 2 U. C. Q. B. 353, per *Robinson*, C. J.

that if the marriage is voidable merely, it will suffice to constitute bigamy. (b) It has been held that though the second marriage would have been void, as for consanguinity or the like, the defendant is guilty of bigamy. (c) But the majority of the judges of the Irish Court of Criminal Appeal have held that to constitute the offence of bigamy, the second marriage must be one which, but for the existence of the previous marriage, would have been a valid marriage. (d) This doctrine has been very materially modified in a late case. (e) It is there laid down that it is the *appearing* to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy. (f)

Where a person already bound by an existing marriage, goes through a form of marriage known to and recognized by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, such person is guilty of bigamy, notwithstanding any special circumstances which, independently of the bigamous character of the marriage, may constitute a legal disability in the parties, or make the form of marriage resorted to inapplicable to their particular case. Thus where the prisoner, having a wife living, went through the ceremony of marriage with another woman who was within the prohibited degrees of consanguinity, so that the second marriage, even if not bigamous, would have been void under the 5 & 6 Wm. IV., c. 54, s. 2, it was held that he was guilty of bigamy. (g)

The material inquiry, therefore, in cases of bigamy, is as to the validity of the alleged marriages, and the evidence by which such validity may be established.

(b) *Reg. v. Jacobs*, 2 Mood. C. C. 140 ; Arch. Cr. Pldg. 886.

(c) *Reg. v. Brawn*, 1 C. & K. 144.

(d) *Reg. v. Fanning*, 10 Cox, 411 ; see also *Reg. v. Clarke*, *ibid.* 474 ; Arch. Cr. Pldg. 887.

(e) *Reg. v. Allen*, *infra*.

(f) See *Reg. v. Brawn*, *supra*, 144, per Lord Denman ; *Reg. v. Penson*, 3 C. & P. 412.

(g) *Reg. v. Allen*, L. R. 1 C. C. R. 367 ; *Reg. v. Fanning*, *supra*, disapproved.

Under the Con. Stat. U. C., c. 32, s. 6, a copy of an extract from the register of the marriage produced from the proper custody, if signed and certified in compliance with this clause, is sufficient evidence of the marriage, provided some proof, either direct or presumptive, be given of the identity of the parties. (*h*)

Evidence of reputation, or the presumption of marriage, arising from long cohabitation, will not suffice on indictments for bigamy, but there must be proof of a marriage in fact, such as the court can judicially hold to be valid. (*i*) The admission of the first marriage by the prisoner, unsupported by other testimony, is sufficient to support a conviction for bigamy. (*j*) The prisoner's admission of a prior marriage is evidence that it was lawfully solemnized. (*k*) The first wife is not admissible as a witness to prove that her marriage with the prisoner was invalid; (*l*) and she cannot be allowed to give evidence either for or against the prisoner. (*m*) But, after proof of the first marriage, the second wife may be a witness; (*n*) for then it appears that she is not the legal wife of the prisoner. (*o*)

On an indictment for bigamy, the witness called to prove the first marriage swore that it was solemnized by a justice of the peace, in the state of New York, who had power to marry; but this witness was not a lawyer or inhabitant of the United States, and did not state how the authority was derived, as by written law or otherwise. Although the court, in their individual capacity, knew that justices of

(*h*) *Re Hall's estate*, 22 L. J. (Ch.) 177; *re Porter's trusts*, 25 L. J. (Ch.) 688; Arch. Cr. Pldg. 884.

(*i*) *Reg. v. Smith*, 14 U. C. Q. B. 567-8, per Robinson, C. J.; *Breaky v. Breaky*, 2 U. C. Q. B. 353, per Robinson, C. J.; and see *doe dem. Wheeler v. M. Williams*, 3 U. C. Q. B. 165.

(*j*) *Reg. v. Creumer*, 10 L. C. R. 404.

(*k*) *Reg. v. Newton*, 2 M. & Rob. 503; *Reg. v. Simmonsto*, 1 C. & K. 164; Arch. Cr. Pldg. 885.

(*l*) *Reg. v. Madden*, 14 U. C. Q. B. 588; 3 U. C. L. J. 106; *Reg. v. Tubbee*, 1 U. C. P. R. 103. per Macaulay, C. J.

(*m*) *Reg. v. Bienvenu*, 15 L. C. J. 141.

(*n*) *Reg. v. Tubbee*, *supra*, 98.

(*o*) *Reg. v. Madden*, *supra*, 3 U. C. L. J. 106, per Robinson, C. J.

the peace had such power in the state of New York, and that the evidence given was correct, yet they held it insufficient. (*p*)

The production and proof of a deed executed by the prisoner, containing a recital of his having a wife and child in England, and conveying lands in trust for them, is not sufficient evidence to prove a prior marriage, even when coupled with evidence of statements made by him at the time of execution to one of the trustees, to the effect that he had quarrelled with his present wife, and had a lawsuit with her; that the place had been bought with his wife's money, and he wished it to go to her; the trustees never having paid over anything to her, nor written to or heard from her. (*q*)

In one case, where the prisoner relied on the first wife's lengthened absence, and his ignorance of her being alive, it was held that he must show inquiries made, and that he had reason to believe her dead, or, at least, could not ascertain where she was, or that she was living, more especially where as in this case he had deserted her, and this notwithstanding that the first wife has married again. (*r*)

In another case, when it was proved that the prisoner and his first wife had lived apart for the seven years preceding the second marriage, it was held incumbent on the prosecution to show that during that time he was aware of her existence; and that in the absence of such proof, the prisoner was entitled to an acquittal. (*s*) From these cases it would seem that the circumstances connected with the separation, affect materially the burden of proof.

On an indictment for bigamy, it is incumbent on the prosecution to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date

(*p*) *Reg. v. Smith*, 14 U. C. Q. B. 565.

(*q*) *Reg. v. Duff*, 29 U. C. C. P. 255.

(*r*) *Reg. v. Smith*, 14 U. C. Q. B. 565.

(*s*) *Reg. v. Curgewoen*, L. R. 1, C. C. R. 1; 35 L. J. (M. C.) 58; *Reg. v. Biavenu*, 15 L. C. J. 341; *Reg. v. Fontaine*, 15 L. C. J. 141; see also *Reg. v. Heaton*, 3 F. & F. 819.

of the second marriage. This is purely a question of fact for the jury to decide on the particular circumstances of the case, and there is no presumption of law either that the party is alive or dead. (*t*) Therefore, where, on a trial for bigamy, it was proved that the prisoner married A. in 1836, left him in 1843, and married again in 1847. Nothing was heard of A. after the prisoner left him, nor was any evidence given of his age. The court held that there was no presumption of law either in favor of or against the continuance of A.'s life up to 1847, but that it was a question for the jury, as a matter of fact, whether or not A. was alive at the date of the second marriage. (*u*) But when the case is brought within the operation of the proviso in the 32 & 33 Vic., c. 20, s. 58, which exempts from criminal liability "any person marrying a second time, whose husband or wife has been continually absent from such person for the space of seven years, then last past," there is no question for the jury, and the prisoner is exonerated from criminal liability, though the first husband or wife be proved to have been living at the time when the second marriage was contracted. By this proviso, the legislature sanctions a presumption that a person who has not been heard of for seven years is dead; but the proviso affords no ground for the converse proposition,—namely, that when a person has been seen or heard of within seven years, a presumption arises that he is still living. (*v*)

The prisoner having a wife living, was married to another woman in the presence of the registrar, describing himself, not as E. R., his true name, but as B. R. There was no evidence to show that the second wife knew that his Christian name was misdescribed. It was held, nevertheless, that the prisoner was guilty of bigamy, for the presumption in favor of marriage clearly imposed the burden of proving the invalidity of the second marriage upon the prisoner. (*w*)

(*t*) *Reg. v. Lumley*, L. R. 1, C. C. R. 196; 38 L. J. (M. C.) 86.

(*u*) *Ibid.*

(*v*) *Reg. v. Lumley*, L. R. 1 C. C. R. 198, per *Lush*, J.

(*w*) *Reg. v. Rea*, L. R. 1 C. C. R. 365.

Where the prisoner had successively married A., B., C. and D., on an indictment for marrying D., C. being then alive, it was held that, whether or not any evidence of the fact were offered, it was for the jury to say whether A. was living at the time of the prisoner's marriage with C. (x)

The common and statute law of England in relation to marriage, as existing at the time of the enactment of the 32 Geo. III., c. 1, was introduced by this statute. The canon law, so far as it was part of the law of England at that time, was also introduced, with the 26 Geo. II., c. 33; 25 Hy. VIII., c. 22; 28 Henry VIII., c. 7; 28 Henry VIII., c. 16; and 32 Henry VIII., c. 38; so far as they remained in force in England. (y)

Before the 26 Geo. II., c. 33, clandestine marriages, though not void, were illegal, and subjected the parties to ecclesiastical censure: *i. e.*, all marriages were required to be celebrated in *facie ecclesiæ*, and by banns or license, or if a minor, by consent of parents, otherwise they were voidable in the ecclesiastical courts. Such marriages were rendered void by this statute, but the 11th clause thereof, in which the avoiding provision is contained, does not apply here. It is therefore illegal in this country, as it was in England before the 26 Geo. II., c. 33, to marry by license, where both or either of the parties are under twenty-one, without the consent of parents or guardians. But such marriages are not absolutely void. They are, however, irregular. (z)

The Imp. Act 5 and 6 Wm. IV, c. 54, is one of convenience and policy, and does not expressly, or by necessary intendment, extend to the colonies. It is, therefore, not in force here. This statute avoids all marriages celebrated between persons within the prohibited degrees of consanguinity; and, under it, a marriage by a man with the sister of his

(x) *Rex v. Willshire*, L. R. 6 Q. B. D. 366.

(y) *Hodgins v. McNeil*, 9 U. C. L. J. 126, per *Esten*, V.-C.; 9 Grant, 305; *Reg. v. Roblin*, 21 U. C. Q. B. 357; see 9 U. C. L. J. 1, as to the English marriage laws, when the 32 Geo. III., c. 1, was passed.

(z) *Hodgins v. McNeil*; *Reg. v. Roblin*, *supra*.

deceased wife is absolutely void, (a) though solemnized abroad between British subjects, in a country by the law of which the marriage would have been valid. (b) This doctrine does not apply here; consequently the marriage of a man with the sister of his deceased wife is not void. (c)

To render a marriage contracted by banns invalid, it must be contracted with a knowledge by both parties that no true publication of banns has taken place. (d)

It seems that if parties are married by banns, it is no objection that they are under age; at all events, such was the law in England prior to the 26 Geo. II., c. 33. (e) As the publication of banns in the open manner required gives parents and guardians timely notice of the intended marriage, and an opportunity of forbidding it, so that, if they make no effort to prevent it, their consent may reasonably be assumed, (f) it would not seem unreasonable to hold that the marriage by banns of a minor should be valid. Where banns have been published, and no dissent been expressed by parents or guardians at the time of publication, the husband being under age does not make the marriage void, even by the English Marriage Act 26 Geo. II., c. 33. (g) It is not necessary that marriages should be solemnized in a church, or within any particular hours. (h)

The Imp. stat. 28 and 29 Vic., c. 64, declares that colonial laws establishing the validity of marriages shall have effect throughout Her Majesty's dominions. The 11 Geo. IV., c. 36, cured defects in the form of marriages solemnized by justices of the peace before the passing of the Act. (i)

The 18 Vic., c. 129, indicates clearly that the former statute was not intended to operate retrospectively, except

(a) *Reg. v. Chadwick*, 11 Q. B. 173; 17 L. J. (M. C.) 33.

(b) *Brook v. Brook*, 3 Smale & G. 481.

(c) *Hodgins v. McNeil*, 9 Grant, 305; 9 U. C. L. J. 126.

(d) *Reg. v. Rea*, L. R. 1 C. C. R. 365, per *Kelly*, C. B.; *Rex v. Wroxton*, 4 B. & Ad. 640; *Tongue v. Tongue*, 1 Moore, P. C. cases, 90.

(e) *Rex v. Inhab. Hodnetts*, 1 T. R. 99, per Lord Mansfield.

(f) *Reg. v. Roblin*, 21 U. C. Q. B. 454, per *Robinson*, C. J.

(g) *Reg. v. Secker*, 14 U. C. Q. B. 604.

(h) *Reg. v. Secker*, *supra*; Con. Stat. U. C. c. 72, s. 3.

(i) *Doe dem. Wheeler v. McWilliams*, 2 U. C. Q. B. 77.

in the case of marriages solemnized by persons who before that Act had authority to solemnize marriage. The 11 Geo. IV., c. 36, had two distinct objects,—first, to remove difficulties which might arise in consequence of marriages having been irregularly performed by persons who had authority to marry; and, secondly, to confer authority to solemnize marriages upon ministers of certain religious bodies, whose ministers had no such authority before that Act was passed. The Act has retrospective force as to the latter object only. (*j*)

The 23 Vic., c. 11, and 24 Vic., c. 46, confirm and legalize certain marriages therein mentioned. Chapters 46 and 47 of the 25 Vic. contain certain provisions as to registering marriages and the offences connected therewith. Marriages contracted in Ireland between members of the Church of England and Presbyterians celebrated by ministers not belonging to the Church of England are legalized by the Imp. stat. 5 & 6 Vic., c. 26, and such marriages celebrated before that Act was passed are legal marriages in this country. (*k*) A written contract is not essential to the validity of a Jewish marriage, which has been solemnized with all the usual forms and ceremonies of the Jewish service and faith. Such marriage is valid, though there exists in relation to it a written contract which is not produced. (*l*) A case has been decided in Quebec as to the marriage of a Lower Canadian by birth with a squaw of the Cree nation. (*m*) In this case it was held (*inter alia*) that a marriage contracted where there are no priests, no magistrates, or civil or religious authority, and no registers, is valid, though not accompanied by any religious or civil ceremony. An Indian marriage between a Christian and a woman of that nation or tribe, is valid, notwithstanding the assumed existence of polygamy and divorce

(*j*) *Pringle v. Allan*, 18 U. C. Q. B. 578, per *Robinson*, C. J.

(*k*) *Breakey v. Breakey*, 2 U. C. Q. B. 349.

(*l*) *Frank v. Carson*, 15 U. C. C. P. 135.

(*m*) *Connolly v. Woolrich*, 11 L. C. J. 197.

at will which are no obstacles to the recognition by our courts of a marriage contracted according to the usages and customs of the country; and an Indian marriage, according to the usage of the Cree country, followed by cohabitation and repute, and the bringing up of a numerous family, will be recognized as a valid marriage by our courts. (n)

A marriage in a foreign country between persons not being British subjects, if invalid there, must be held invalid in this country, though the parties have done all in their power to make it a valid legal marriage. (o) The age of consent to marriage in a woman is twelve, (p) and for a man fourteen. If a boy under fourteen, or a girl under twelve contracts matrimony, it is void, unless both husband and wife consent to and confirm the marriage after the minor arrives at the age of consent. (q)

In an indictment for bigamy committed in the United States, it is necessary that the indictment should contain allegations that the accused is a British subject; that he is or was resident in the province, and that he left it with intent to commit the offence. (r) The words, "or elsewhere," in the 32 & 33 Vic., c. 20, s. 58, extend to bigamy committed in a foreign jurisdiction. (s) It is immaterial whether the second marriage takes place in Canada or in a foreign country, provided, if the second marriage take place out of Canada, the accused be a subject of Her Majesty. (t) A soldier convicted of bigamy is not thereby discharged from military service. (u)

It has been held that, under the 55 Geo. III., c. 3, a writ of *exigi facias* against a person against whom an indictment for bigamy has been found at the assizes, will be awarded by this court upon the application of the prosecutor, without its being applied for by the attorney-general. (v)

(n) *Connolly v. Woolrich*, 11 L. C. J. 197.

(o) *Harris v. Cooper*, 31 U. C. Q. B. 182.

(p) *Reg. v. Bell*, 15 U. C. Q. B. 287-9.

(q) *Reg. v. Gordon*, R. & R. 48; Arch. Cr. Pldg. 886.

(r) *Reg. v. McQuiggan*, Rob. Dig. 123-4.

(s) *Ibid.*

(t) See sec. 58.

(u) *Reg. v. Creamer*, 10 L. C. R. 404.

(v) *Rex v. Elrod*, Taylor, 120.

Libel.—A libel upon an individual is a malicious defamation of any person made public, either by printing, writing, signs, or pictures, in order to provoke him to wrath, or to expose him to public hatred, contempt, or ridicule. (*w*)

Wherever an action will lie for a libel, without laying special damage, an indictment will also lie. (*x*) An action for libel lies against a corporation aggregate where malice in law may be inferred from the publication of the words. (*y*)

It would seem also that a corporation may be indicted by its corporate name, and fined for the publication of such libel, (*z*) and an action for libel may be brought by one corporation against another. (*a*) A joint action may be maintained against several persons for the joint publication of a libel. (*b*) It seems also that an indictment or information will lie against all persons concerned in the joint publication of a libel. (*c*)

The Imperial statute 32 Geo. III., c. 60, is in force in Canada, and consequently it is for the jury to say whether under the facts proved there is a libel, and whether the defendant published it. (*cc*)

Where the defendant published the following of and concerning the plaintiff,—“Caution: To all persons who may be entering into any arrangements with J. M. C. for his self-action cattle and stock pump, who claims to have patented the same in April last, I wish by this notice to caution the public against having anything to do with Cousins or his pumps, it being an infringement on my patent, which was obtained by me in 1858. I intend to prosecute him immediately. Beware of the fraud and save costs,”—it was held that this publication disclosed a libel on the plaintiff person-

(*w*) Arch. Cr. Pldg. 857.

(*x*) Arch. Cr. Pldg. 857; *Stanton v. Andrews*, 5 U. C. Q. B. O. S. 229, per *Macaulay*, J.

(*y*) *Whitfield v. S. E. Ry. Co.*, 4 U. C. L. J. 242; E. B. & E. 115.

(*z*) *E. C. Ry. Co. v. Broom*, 6 Ex. 314; Arch. Cr. Pldg. 7.

(*a*) *L'Institut Canadien v. Le Nouveau Monde*, 17 L. C. J. 296.

(*b*) *Brown v. Hirley*, 5 U. C. Q. B. O. S. 734.

(*c*) *Ibid.*; *Rez v. Benfield*, Burr. 980; 5 Mod. 167.

(*cc*) *Reg. v. Dougall*, 18 L. C. J. 85.

ally, in the caution to all persons about to enter into arrangements with the plaintiff for his pumps, against having anything to do with plaintiff or his pumps, and in the words "beware of the fraud," in relation to the infringement of the patent. (d)

Where the plaintiffs were manufacturers of bags, and manufactured a bag which they called the "bag of bags;" and the defendant printed and published concerning the plaintiffs and their business the words following: "As we have not seen the bag of bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be. But the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar, and which has been forced upon the notice of the public *ad nauseam*." It was held on demurrer (by *Mellor* and *Hannen*, J.J.) that it was a question for the jury whether the words did not convey an imputation on the plaintiffs' conduct in their business, and whether the language went beyond the limits of fair criticism; by *Lush*, J., that the words could not be deemed libellous, either upon the plaintiffs, or upon the mode of conducting their business. (e)

The defendant published in a newspaper an article respecting the plaintiff as inspecting field-officer of volunteers and militia, in which, after referring to a recent inspection of a particular battalion, and stating that it was not often that "an example of swearing and drunkenness was set by the officers to their men," it was said it was very little to the plaintiff's credit that "he appears before the volunteers as a transgressor without apology of those laws of discipline and good conduct, the observance of which he so strictly enjoins." In another part, it was said, "we have been for some time aware that the plaintiff was often incapable of attending to his duty here and elsewhere, and now that his evil habits appear to be entirely beyond his control, it is high time for

(d) *Cousins v. Merrill*, 16 U. C. C. P. 114.

(e) *Jenner v. A'Beckett*, L. R. 7 Q. B. 11.

the head of the department to deal with the case." Per *Draper*, C. J., the publication complained of, without the aid of any innuendo or explanation, is libellous. (*f*)

To charge a man with ingratitude is libellous, and such charge may also be libellous, notwithstanding that the facts upon which it is founded are stated, and they do not support the charge. (*g*)

A written paper charging the plaintiff with having wrongfully taken the defendant's logs, sawing them up and selling the lumber, is libellous, without any averment or proof that larceny was thereby imputed. (*h*) So a written paper, charging the plaintiff, an attorney, with being governed entirely by a craving after his own gains, without regard to the interests of his clients, and reckless of bringing them to ruin, is libellous. (*i*) But it is not libellous to write of a man that his outward appearance is more like that of an assassin than of an honest man. (*j*)

The publication of any obscene writings is unlawful and indictable. (*k*) The test of an obscene publication is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. (*l*) It is no defence to an indictment for such a publication that the object of the party was laudable; (*m*) for, in case of libel, the law presumes that the party intended what the libel is calculated to effect. (*n*)

It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are

(*f*) *Baretto v. Pirie*, 28 U. C. Q. B. 469.

(*g*) *Cox v. Lee*, L. R. 4 Ex. 284.

(*h*) *Connick v. Wilson*, 2 Kerr, 496.

(*i*) *Andrews v. Wilson*, 3 Kerr, 86.

(*j*) *Lang v. Gilbert*, 4 Allen, 445.

(*k*) *Reg. v. Hicklin*, L. R. 3 Q. B. 360; 37 L. J. (M. C.) 89.

(*l*) *Ibid.* 371, per Cockburn, C. J.

(*m*) *Ibid.*

(*n*) *Reg. v. Atkinson*, 17 U. C. C. P. 304, per J. Wilson, J.

neither criminally nor civilly responsible. (o) The immunity thus afforded in respect to the publication of the proceedings of courts of justice rests on a twofold ground: First, the occasion is such as repels the presumption of malice, for they are published without any reference to the individuals concerned, and solely to afford information to the public for the benefit of society. The other and broader principle on which this exception to the general law of libel is founded is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good. (p)

As to the publication of *ex parte* proceedings of courts of justice, such as before magistrates, and even before the superior courts—as, for instance, applications for criminal informations—if an indictment were preferred for such publication, it would probably be held that the criterion of the privilege is not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the party affected. (q)

As to the privilege of reporting legal proceedings, the dignity of the court cannot be regarded, but only the nature of the alleged judicial proceeding which is reported. For this purpose, no distinction can be made between a court *pie poudre* and the House of Lords sitting as a court of justice. But as to magistrates, if, while occupying the bench from which magisterial business is usually administered, they, under pretence of giving advice, publicly hear slanderous complaints, over which they have no jurisdiction although their names may be in the commission of the peace, a report

(o) *Wason v. Walter*, L. R. 4 Q. B. 87, per Cockburn, C. J. 38; L. J. (Q. B.) 34; *Ryalls v. Leader*, L. R. 1 Ex. 296; 35 L. J. Ex. 185; but see *Small v. McKenzie*, Draper, 188.

(p) *Wason v. Walter*, L. R. 4 Q. B. 87-8, per Cockburn, C. J.

(q) *Ibid.* 94, per Cockburn, C. J.

of what passes is as little privileged as if they were illiterate mechanics assembled in an alehouse. (r)

The privilege accorded to a fair and impartial report of proceedings in a public court of justice extends to preliminary proceedings on a charge of an indictable offence before a magistrate, sitting in an open police court, where the proceedings terminate in the dismissal of the charge, and where, the report keeping pace with the proceedings, which occupy several days, is published in parts, in different numbers of a newspaper, and a portion of it while the proceedings are pending. But the privilege does not extend to comments by the reporter reflecting on any of the parties; as in an account of proceedings out of which an abortive charge of perjury arose, to the statement that the evidence of certain witnesses entirely negatived the story of the defendant, and satisfied the court that he knew that it was false. (s)

Proceedings before magistrates, under the 32 & 33 Vic., c. 31, "in relation to summary convictions and orders," in which, after both parties are heard, a final judgment is given, subject to appeal, are strictly of a judicial nature; the place in which such proceedings are held is an open court; (t) the defendant, as well as the prosecutor, has a right to the assistance of attorney and counsel, and to call what witnesses he pleases; and both parties having been heard, the trial and the judgment may lawfully be made subject of a printed report, if that report be impartial and correct. (u)

A magistrate, upon any preliminary inquiry respecting an indictable offence, may, if he thinks fit, carry on the inquiry in private, and the publication of any such proceedings before him would be unlawful; but while he continues to sit *foribus apertis*, admitting into the room where

(r) *Lewis v. Levy*, 4 U. C. L. J. 215, per *Campbell*, C. J.; E. B. & E. 554.

(s) *Ibid.* 213; E. B. & E. 537.

(t) See sec. 29.

(u) *Lewis v. Levy*, 4 U. C. L. J. 215, per *Campbell*, C. J.

he sits as many of the public as can be conveniently accommodated, thinking that this course is best calculated for the investigation of truth and the satisfactory administration of justice, the court in which he sits is to be considered as a public court of justice. (v)

The privilege of publishing judicial proceedings extends to all parties concerned therein. The acts, words, or writings of judges of the superior or county courts, grand or petty jurymen, or witnesses, are absolutely privileged, on the ground that the law gives faith and credence to what they do in the course of a judicial proceeding. (w)

An affidavit made in a judicial proceeding is privileged on the established principle that no action will lie for words spoken or written in the course of a judicial proceeding, and this although the affidavit is libellous in its language, and there is evidence of express malice. (x)

A letter, or report in writing, by a military officer, in the ordinary course of his duty as such officer, is an absolutely privileged communication, even if written maliciously, and without reasonable and probable cause. (y)

A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminary matter which, without this privilege, would be slanderous and actionable.

The defendant, with others, having presented a memorial to the Secretary of State for the Home Department, setting out certain acts done by the plaintiff, and complaining of his conduct, and requesting his removal from the office of a justice of the peace; the court held, in an action for libel by the plaintiff against the defendant, the jury having found *bona fides*, that the communication was privileged, since,

• (v) *Lewis v. Levy*, 4 U. C. L. J. 216, per Campbell, C. J.
 (w) *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 103, per Cockburn, C. J.
 (x) *Henderson v. Broomhead*, 5 U. C. L. J. 262; 4 Ex. N. S. 569.
 (y) *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94, per Mellor and Lush, J.J., Cockburn, C. J., dissenting.

being addressed to the Secretary of State, it was virtually addressed to Her Majesty, for the removal of the plaintiff from his office, and must be taken to be done *bona fide* with a view of obtaining redress, and that the memorial was properly addressed to the Secretary of State, he having a corresponding duty to perform in the matter. (z)

An action for libel contained in communications made to the executive Government, with a view of obtaining redress, cannot be sustained, unless it can be proved that the party making them acted maliciously, and without probable cause. (a)

A petition to the Lieutenant Governor, complaining of a public grievance in regard to the conduct of commissioners of the Court of Requests, and charging them with partiality, corruption, and connivance at extortion, and highly defamatory in its language, signed by a great number of persons, and praying for redress, is a privileged communication; and no action for libel will lie upon it, though the defendant has circulated it, and been the means of obtaining signatures to it of individuals who knew nothing of the facts stated in such petition, and some of whom supposed it to be a matter of a totally different description. (b)

The principle of the law laid down in the Bill of Rights, 1 Wm. & M., stat. 2, namely, that it is the right of the subject to petition the Queen, and that all commitments and prosecutions for such petition are illegal, applies to the case of a petition to the Governor, as representing the Queen. The ground on which the principle rests applies as well to petitions addressed to the head of the executive Government as to either of the other branches of the legislature. But, in any of these cases, evidence of malice, coupled with the knowledge that the statements were false, or the inference of malice arising from the certain consciousness on the part of the defendant that the statements were false, may, perhaps,

(z) *Harrison v. Bush*, 1 U. C. L. J. 156; 5 E. & B. 344.

(a) *Rogers v. Spalding*, 1 U. C. Q. B. 258.

(b) *Stanton v. Andrews*, 5 U. C. Q. B. O. S. 211.

constitute so clear a case of flagrant and intentional abuse of the right of petitioning as to destroy the privilege, and give the injured party a claim to legal redress. (c)

Petitions to the Queen, or to any of her ministers, complaining of the conduct of an individual, and containing defamatory statements against him, are or are not privileged communications, according to the motives and intention of the petitioner in making them. If he fairly and honestly makes statements in such petition prejudicial to any person's character, but which he believes to be true, and which are made for the sole purpose of obtaining redress of what he really considers an injury or abuse, his petition is privileged. If he falsely and maliciously prefers a scandalous charge against the individual in such a petition, with the intention of committing an injury, instead of seeking redress, his petition is not privileged. The legal presumption is always in favour of the petitioner that he acts fairly and honestly, unless the circumstances of the case afford some evidence of an evil and malicious intention, in which case the question of privilege is a fact for the jury to determine, under the direction of the court.

The declaration in the Bill of Rights was intended for the protection of petitioners applying to the Crown for the redress of some supposed grievances of a public and general character, and which is thought to be occasioned by some existing law, order in council, proclamation, or other act of the Government, or of any department of Government, but not a petition by one individual against another. The whole scope and spirit of the Bill of Rights points to public and political rights. Private rights were left to the protection, and private injuries to the discretion, of the common law, or to such other laws as might be made by parliament in the ordinary course of legislation. (d)

(c) *Stanton v. Andrews*, 5 U. C. Q. B. O. S. 220, per *Robinson*, C. J.; *Fairman v. Ives*, 1 D. & R. 252; 5 B. & Ald. 642.

(d) *Stanton v. Andrews*, 5 U. C. Q. B. O. S. 221 et seq., per *Sherwood*, J.

In consequence of the decision in *Stockdale v. Hansard*, (e) the 31 Vic., c. 23, was passed. Section 4 of this Act provides that in any proceeding, civil or criminal, against a person for publishing any report, paper, vote, or proceeding, by or under the authority of the Senate or House of Commons, the court or judge may stay all proceedings, on production of a certificate, under the hand of the speaker or clerk of the Senate or House of Commons, shewing the authority for the publication. (f)

Where a presumptive case of publication, by the act of any other person, by his authority, has been established, it will be a good defence for the defendant to show that such publication was made without his authority, consent, or knowledge, and did not arise from want of due care or caution on his part. (g)

It would seem that s. 9 of this statute applies to private and personal libels only. (h)

Members of parliament are neither civilly nor criminally liable for anything they may say in parliament, in the course of any proceedings therein; and, from motives of the highest policy and convenience, ministers of the Crown cannot be held liable for any advice given to the Sovereign, however prejudicial such advice may be to individuals. (i)

But prior to the decision in *Wason v. Walter*, (j) there was no authority that the publication of a debate in parliament was privileged. In this case, it was held that a faithful report, in a public newspaper, of a debate in either house of parliament, containing matter disparaging to the character of an individual, which had been spoken in the course of the debate, is privileged, on the same principle as

(e) 9 A. & E. 1; 2 Per. & D. 1.

(f) *Stockdale v. Hansard*, 11 A. & E. 297; 3 Per. & D. 346.

(g) Con. Stat. U. C., c. 103, s. 13; and see *Reg. v. Holbrook*, L. R. 3 Q. B. D. 60.

(h) *Reg. v. Duffy*, 2 Cox, 45.

(i) *Dawkins v. Lord Paulet*, L. R. 5, Q. B. 116-7, per Mellor, J.; see also *ex parte Wason*, L. R. 4 Q. B. 573.

(j) L. R. 4 Q. B. 73; 38 L. J. (Q. B.) 34.

an accurate report of proceedings in a court of justice is privileged—namely, that the advantage of publicity to the community at large outweighs any private injury resulting from the publication.

The plaintiff presented a petition to the House of Lords, charging a high judicial officer with having, thirty years before, made a statement, false to his own knowledge, in order to deceive a committee of the House of Commons, and praying inquiry, and the removal of the officer, if the charge was found true. A debate ensued on the presentation of the petition, and the charge was utterly refuted. That was held to be a subject of great public concern, on which a writer in a public newspaper had full right to comment, and the occasion was therefore so far privileged that the comments would not be actionable so long as a jury should think them honest, and made in a fair spirit, and such as were justified by the circumstances, as disclosed in an accurate report of the debate. (*k*)

But all the limitations placed on the publication of the proceedings of courts of justice, to prevent injustice to individuals, apply to parliamentary debates. A garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection; and the publication of a single speech in parliament, for the purpose or with the effect of injuring an individual, will be unlawful. (*l*) But such a speech is privileged, if *bona fide* published by a member, for the information of his constituents. (*m*)

Whatever will deprive reports of proceedings in courts of justice of immunity will apply equally to a report of proceedings in parliament.

Independently of the orders of the House, there is nothing

(*k*) *Wason v. Walter*, L. R. 4 Q. B. 73; 38 L. J. (Q. B.) 34.

(*l*) *Ibid.* 94, per Cockburn, C. J.; *Rex v. Lord Abingdon*, 1 Esp. 226; *Rex v. Creevey*, 1 M. & S. 273.

(*m*) *Davison v. Duncan*, 7 E. & B. 229; 26 L. J. (Q. B.) 104; *Wason v. Walter*, *supra*, 95, per Cockburn, C. J.

unlawful in publishing reports of parliamentary proceedings. (n)

It has been held that ministers of religion in the Province of Quebec are amenable to the courts of civil jurisdiction in the same manner and to the same extent as other persons; and that an action of slander will lie against a Roman Catholic priest for injurious expressions regarding private individuals, uttered by him in his sermon. (o)

When a party acts in good faith, and not officially, in a matter of business, in which he has a personal interest, and is also employed by others, a letter written under such circumstances, though it contains a term in its gravest sense libellous, is privileged, on account of his particular and legitimate connection with the subject of which he was writing, rebutting the presumption of malice; and in the absence of evidence of actual malice, he could not be prosecuted for libel. (p) The *bona fides* is made out when the privilege is ascertained. The truth of the words is assumed to support the privilege, and the defendant is not called upon to prove it. (q)

The privilege which a communication receives must result either from some right on the part of the defendant to say what is complained of, or from a sense of duty, public or private, legal or moral, under which the defendant is acting. (r) But where the violence of the language, or the manner of publication, is in excess of what the occasion justifies, the privilege is gone. (s)

The proper meaning of a privileged communication is this: that the occasion on which the communication was made

(n) *Wason v. Walter*, L. R. 4 Q. B. 95, per Cockburn, C. J.

(o) *Deroin v. Archambault*, 19 L. C. J. 157; see also *Brossoit v. Turcotte*, 20 L. C. J. 141; *Blanchard v. Richer*, 20 L. C. J. 146.

(p) *Hanna v. De Blaquiére*, 11 U. C. Q. B. 310; *Tench v. G. W. Ry. Co.*, 33 U. C. Q. B. 8; *Ronayne v. Wood*, 5 *Revue Leg.* 301; *Durette v. Cardinal*, 4 *Revue Leg.* 232.

(q) *McCullough v. McIntee*, 2 E. & A. 390.

(r) *Poitevin v. Morgan*, 10 L. C. J. 99, per Badgley, J.; *Hearne v. Stowell*, 12 A. & E. 719-26.

(s) *Graham v. Crozier*, 44 U. C. Q. B. 378; *Miller v. Johnston*, 23 U. C. C. P. 580; *Holliday v. Ontario Farmers' M. Ins. Co.*, 1 App. R. 483.

rebutts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact, and that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made. (t)

The resolution of an incorporated association censuring one of its members, is privileged. (u) And where the general manager of a railway company dismissed the plaintiff, a conductor, for alleged dishonesty, and by his directions placards, describing the offence and stating the plaintiff's dismissal, were posted up in the company's private offices for the information and warning of the company's employees, it was held a reasonable mode of publication, although the notices had been seen by strangers. (v)

The proof of express malice appears to consist, in all cases, in showing *mala fides* in the defendant, and this renders him liable, because, by the general rule applicable to such cases, every person is bound for an intentional injury done by him to another. (w)

To entitle matter otherwise libellous to the protection which attaches to communications made in the fulfilment of a duty, *bona fides* or honesty of purpose is essential; and to this again two things are necessary: first, that the communication be made not merely in the course of duty but also from a sense of duty; and second, that it be made with a belief of its truth. (x)

Where the libel is clearly a privileged communication, the inference of malice cannot be raised on the face of the libel itself; but intrinsic evidence of actual express malice must be given, and it is not to be taken to be malicious although

(t) *Poitevin v. Morgan*, 10 L. C. J. 98, per *Badgley, J.*; see also *Shaver v. Linton*, 22 U. C. Q. B. 183, per *Hagarty, J.*; *Somerville v. Hawkins*, 10 C. B. 583.

(u) *Cuthbert v. The Commercial Trav. Ass.*, 39 U. C. Q. B. 578.

(v) *Tench v. G. W. Ry. Co.* 35 U. C. Q. B. 8.

(w) *Poitevin v. Morgan*, 10 L. C. J. 98, per *Badgley, J.*

(x) *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 102, per *Cockburn, C. J.*

it may turn out to be unfounded, but the plaintiff must also prove the statement to be false as well as malicious. (y)

Malice, in its legal sense, means a wrongful act done intentionally, without just cause or excuse. (z) By legal malice is meant no more than the wrongful intention, which the law always presumes as accompanying a wrongful act, without any proof of malice in fact. (a)

For the purpose of proving express malice, the plaintiff may show that the libel is really untrue; but this alone will not constitute express malice, but it may, along with other circumstances, raise an inference that express malice exists. (b)

Libellous expressions, used in a privileged communication, may be evidence of actual malice for the jury; but if taken in connection with admitted facts, they are such as might have been used honestly and *bona fide* by the defendant, the judge may withdraw the case from the jury, and direct a verdict for the defendant. (c)

The defendant, in a privileged communication, described the plaintiff's conduct as "most disgraceful and dishonest." The conduct so described was equivocal, and might honestly have been supposed by the defendant to be as he described it. The court held that the above words were not of themselves evidence of actual malice. (d)

The question is not simply whether the act or fact stated is true or untrue, but whether the defendant had reason honestly to believe the act or fact to have been as he represented. (e) And the truth of the statement may not always be justification. (f)

(y) *McIntyre v. McBean*, 13 U. C. Q. B. 534. See also *McCullough v. McIntee*, 13 U. C. C. P. 438; *Shaver v. Linton*, 22 U. C. Q. B. 183.

(z) *Poitevin v. Morgan*, 10 L. C. J. 97, per *Badgley*, J.; *McIntyre v. McBean*, 13 U. C. Q. B. 542, per *Robinson*, C. J.

(a) *Wason v. Walter*, L. R. 4 Q. B. 87, per *Cockburn*, C. J.

(b) *McCullough v. McIntee*, 13 U. C. C. P. 441, per *A. Wilson*, J.

(c) *Spill v. Maule*, L. R. 4 Ex. 232.

(d) *Ibid.*

(e) *McCullough v. McIntee*, 13 U. C. C. P. 441, per *A. Wilson*, J.; *Harrison v. Bush*, 5 E. & B. 344.

(f) *Petrie v. Larochelle*, 4 *Revue Leg.* 286; *Reg. v. Dougall*, 18 L. C. J. 85; but see as to truth in actions against public officers, *Genest v. Normand*, 5 *Revue Leg.* 161.

When express malice is shown, by proving the libel false as well as malicious, the defendant may still make out a good defence, by showing that he had good ground for believing the statement true, and acted honestly under that persuasion. (g) And acts of the defendant occurring immediately after the publication may be given in evidence to show that there was no malice. (h)

Before it can become material for the jury to inquire whether the defendant acted maliciously or not, the plaintiff must satisfy them that the defendant's statements are not true, and that he had no reasonable ground for believing them to be true. (i)

It is matter of law for the judge to determine whether the occasion of writing or speaking criminatory language, which would otherwise be actionable, repels the inference of malice, constituting what is called a privileged communication. (j) If, at the close of the plaintiff's case, there is no intrinsic or extrinsic evidence of malice, it is the duty of the judge to direct a nonsuit or verdict for the defendant, without leaving the question of malice to the jury.

But whenever there is evidence of malice, either extrinsic or intrinsic, in answer to the immunity claimed, by reason of the occasion, a question arises which the jury, and the jury alone, ought to determine; (k) and the proper course then is for the judge to ask the jury whether the matter was published *bona fide*. If they come to the conclusion that it was, then it is for the judge to say whether, under all the circumstances, it is or is not a privileged communication. (l) It is wrong to leave to the jury whether an alleged libel is

(g) *McIntyre v. McBean*, 13 U. C. Q. B. 534.

(h) *Reg. v. Dougall*, 18 L. C. J. 85.

(i) *McIntyre v. McBean*, 13 U. C. Q. B. 534.

(j) *McCullough v. McIntee*, 2 E. & A. 390.

(k) *Shaver v. Linton*, 22 U. C. Q. B. 183, per *Hagarty*, J.; *Cooke v. Wildes*, 5 E. & B. 340; see also *Poitevin v. Morgan*, 10 L. C. J. 99, per *Badgley*, J.; *Lawless v. A. E. Cotton Co.*, L. R. 4 Q. B. 262; *McIntee v. McCullough*, 10 U. C. L. J. 238 (in E & A)

(l) *Stace v. Griffith*, L. R. 2 P. C. App. 428, per *Lord Chelmsford*.

contained in an official document and privileged communication. (m)

In some cases the presumption of privilege is altogether conclusive, and the law will not allow any evidence to be adduced to remove or impeach it. The regular and established proceedings in parliament and in courts of justice are of this character, and no action for libel can be supported upon any part of their contents. The reasons given for this absolute privilege are, first, that the safety and welfare of the community requires that all such public proceedings should be perfectly unrestrained and free, and only subject to the authority and discretion of the tribunals in which they take place; second, that such tribunals possess the power of expunging all defamatory matters, if irrelevant from the proceedings, and of obliging the offending party to make satisfaction. (n)

When a communication is not absolutely privileged, it is a sufficient answer in point of law to say that it was malicious, and made without reasonable and probable cause. (o)

The defendant, hearing that a tradesman had been hoaxed by a letter written in his name, and ordering a certain article, wrote to the tradesman a letter to the effect that, in his opinion, the letter was written by the plaintiff. It turned out that it was not; but the jury found that the defendant sincerely believed that it was; and the court held that, even if the letter was a libel, it was a privileged communication. (p)

The defendant having published in his newspaper a report read at a vestry meeting, containing a statement to the effect that certain returns of the plaintiff, a medical man, to the registrar under the statute, were wilfully false, such report not having been published by the vestry, it was held that the publication was not privileged. (q)

(m) *Stace v. Griffith*, L. R. 2 P. C. App. 428, per Lord Chelmsford.

(n) *Stanton v. Andrews*, 5 U. C. Q. B. O. S. 221, *et seq.*, per Sherwood, J.

(o) *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 101, per Cockburn, C. J.

(p) *Croft v. Stevens*, 8 U. C. L. J. 280; 7 H. & N. 570.

(q) *Popham v. Pickburn*, 8 U. C. L. J. 335; 7 H. & N. 891; 31 L. J. (Ex.) 133. J

A churchwarden having written to the plaintiff, the incumbent, accusing him of having desecrated the church, by allowing books to be sold in it during service, and by turning the vestry room into a cooking apartment, the correspondence was published without the plaintiff's permission, in the defendant's newspaper, with comments on the plaintiff's conduct; it was held that this was a matter of public interest, which might be made the subject of public discussion, and that the publication was therefore not libellous, unless the language used was stronger than, in the opinion of the jury, the occasion justified. (r)

A charge against the plaintiff, of wrongfully taking the defendant's logs, sawing them into lumber, and selling it, was contained in a letter written by the defendant to one M., an intimate friend of his, who was a near relative to the plaintiff, but in no way interested or concerned in business with either party, with the avowed object of defendant's availing himself of M.'s influence and good offices in his controversies with the plaintiff, and to warn the plaintiff and his mother against the consequences of lawsuits, and the alleged interested motives of his attorney. M. being absent from the country, the letter was opened by his agents and relatives, and became public; it was held that this was not a privileged communication. (s)

It seems the 67th section of 32 & 33 Vic., c. 29, will apply to cases of libel. In *Hughes v. Dinorben*, (t) to prove that libels declared on were written by the defendant, certain documents, admitted to be in his handwriting, were used as standards of comparison. The plaintiff called several witnesses, and, to support and strengthen such evidence, he produced seven anonymous letters, generally relating to the same matters as the libels declared on. This evidence was admitted to prove malice, and the letters were also used as a

(r) *Kelly v. Tinling*, L. R. 1 Q. B. 699; 35 L. J. (Q. B.) 231.

(s) *Connick v. Wilson*, 2 Kerr, 496; *ibid.* 617; and see *Andrews v. Wilson*, 3 Kerr, 86.

(t) 32 L. T. Rep. 271.

comparison of the handwriting in dispute, and no objection was made by defendant's counsel. It was held that these seven anonymous letters were admissible—that they were relevant to the issue to show malice; but that, if a proper objection had been made at the time of the trial, they could not have been received as evidence of handwriting.

Upon an indictment for libel, published at defendant's instance, in a newspaper, it appeared that the editor, who was not indicted, before inserting the libel, showed it to the prosecutor, who did not express any wish to suppress the publication, but wrote a reply, which was also inserted. This was held not such a defence for the parties indicted as to render a conviction illegal. (*u*)

In Quebec it has been held no defence to an action for libel to say that the defendant, a newspaper proprietor, must give his readers all the information he can on public matters; or that what was said of the plaintiff formed part of a general report of the proceedings at a nomination; or, that scenes of violence took place at such nomination, concerning which the public was desirous of being informed; or that the article had to be written in haste; or that the information obtained was from persons worthy of belief; or that the article was written with the sole object of giving information to the public in the manner usually practised by newspapers generally; or that the plaintiff had not demanded a rectification from the defendant; (*v*) or that a rumor existed to the effect stated in the article complained of as libellous. (*w*)

And it is no answer to an application for a criminal information for libel, to say that the defendants had no personal knowledge of the matter contained in the alleged libels, but received them from persons whom they deemed trustworthy; that a certain newspaper (naming it) was controlled by the applicant, who was an active politician, and had published a

(*u*) *Reg. v. McElderry*, 19 U. C. Q. B. 168; see, as to justification, *Stewart v. Rowlands*, 14 U. C. C. P. 485; *Hill v. Hogg*, 4 Allen, 108.

(*v*) *Devy v. Fabre*, 4 Q. L. R. 286.

(*w*) *Reg. v. Dougall*, 18 L. C. J. 85.

number of articles violently attacking one S., who was a candidate for a public office, and the libels in question were published with a view of counteracting the effect of these articles, and believing them to be true and without malice. (x)

The courts in this country, following the English decisions, confine the granting of criminal informations for libel to the case of persons occupying an official or judicial position, and filling some office which gives the public an interest in the speedy vindication of their character, or to the case of a charge of a very grave or atrocious nature. (y) Therefore, leave to the manager of a very large railway company to file a criminal information for libel was refused. (z)

There should be no delay in making the application. The complainant should come into court either during the term next after the cause of complaint arose, or so soon in the second term thereafter as to enable the defendant, unless prevented by the accumulation of business in the court, to show cause within that term; and this without reference to the fact whether an assize has intervened or not. (a)

The court, on such an application, is placed in the position of a grand jury, and must have the same amount of information as would warrant a grand jury in returning a true bill. A grand jury would not be justified in returning a true bill unless the libel itself were laid before them. Therefore, the application for a criminal information must be rejected, unless the libel is filed with the affidavit on which the application is based. (b)

The denial on such an application should be as full, clear, and specific as possible, and all the circumstances must be laid before the court fully and candidly in order that they may deal with the matter. (c)

(x) *Reg. v. Thompson*, 24 U. C. C. P. 252.

(y) *Reg. v. Wilson*, 43 U. C. Q. B. 583; but see *Reg. v. Thompson*, 24 U. C. C. P. 252.

(z) *Ibid.*

(a) *Reg. v. Wilkinson*, 41 U. C. Q. B. 1; *Reg. v. Kelly*, 28 U. C. C. P. 35.

(b) *Ex parte Gury*, 8 L. C. R. 353.

(c) *Reg. v. Wilkinson*, 41 U. C. Q. B. 1.

Under the Con. Stats. U. C., c. 103, a plea to an information for libel must allege the truth of all the matters charged. (d)

The use of the innuendo in an indictment for libel is to explain the evil meaning of the defendant when the words are apparently innocent and inoffensive, or ambiguous. The doctrine of taking words in their mildest sense is applied only when the words, in their natural import, are doubtful, and equally to be understood in one sense as in the other. (e) It is for the court to say whether the innuendo is capable of bearing the meaning assigned by it, and for the jury to say whether that meaning was intended and proved. (f)

Riot.—This offence is defined to be a tumultuous disturbance of the peace, by three persons or more assembling together, of their own authority, with an intent mutually to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. (g)

The difference between a riot and an unlawful assembly is this: the former is a tumultuous meeting of persons, upon some purpose which they actually execute with violence, and the latter is a mere assembly of persons, upon a purpose which, if executed, would make them rioters, but which they do not execute, nor make any motion to execute. (h)

There is also an offence of a similar character, called a rout. This offence is distinguishable from an unlawful assembly in this, that the parties actually make a motion

(d) *Reg. v. Moylan*, 19 U. C. Q. B. 521.

(e) *Somers v. House*, Holt, 39.

(f) *Sturt v. Blagg*, 10 Q. B. 906; *Anonymous*, 29 U. C. Q. B. 462, per Wilson, J.

(g) *Reg. v. Kelly*, 6 U. C. C. P. 372, per Draper, C. J.

(h) *Ibid.*; *Rex v. Birt*, 5 C. & P. 154.

to execute the purpose which, if executed, would make them rioters. (i)

The case of *Reg. v. Kelly* (j) fully maintains the distinction between a riot and unlawful assembly. In this case, the defendant was indicted for riot and assault, and the jury found him guilty of a riot, but not of the assault charged. The court held that a conviction for riot could not be sustained, for the assault, the object of the riotous assembly, had not been executed, but that the defendant might have been found guilty of forming part of an unlawful assembly. (k)

It may be observed generally that all the parts of this definition must be satisfied, in evidence, before the jury can convict of riot. Three persons, or more, must be engaged therein; (l) it must relate to some private quarrel, only; for the proceedings of a riotous assembly, on a public and general account, may amount to overt acts of high treason, by levying war against the Queen. (m) The offence must also be accompanied with some such circumstances either of actual force or violence, or, at least, of an apparent tendency thereto, as are naturally calculated to inspire people with terror, such as carrying arms, using threatening speeches, turbulent gestures, etc. (n)

But it is not necessary that personal violence should have been committed. (o) It is sufficient terror and alarm to sustain the indictment if any one of the Queen's subjects be in fact terrified. (p)

To some extent it is necessary that there should be a pre-determined purpose of acting with violence and tumult; and if parties, met together on a lawful and innocent occasion,

(i) See Russ. Cr. 387; *Reg. v. Vincent*, 9 C. & P. 91.

(j) *Supra*.

(k) *Ibid*.

(l) *Reg. v. Scott*, 3 Burr. 1262; 1 W. Bl. 291; *Reg. v. Sadbury*, 1 Lord Raym. 484; Salk. 593; Arch. Cr. Pldg. 841.

(m) Russ. Cr. 379.

(n) *Reg. v. Hughes*, 4 C. & P. 373; Arch. Cr. Pldg. 842.

(o) *Clifford v. Brandon*, 2 Camp. 369, per *Mansfield*, C. J.; Russ. Cr. 379

(p) *Reg. v. Phillips*, 2 Mood. C. C. 252; C. & Mar. 602; Arch. Cr. Pldg 842.

become involved in a sudden affray, none are guilty but those who actually engage in it, for the breach of the peace was not part of their original purpose. (*q*) But it seems to be immaterial whether the act intended to be done by the persons assembling be in itself lawful or unlawful. (*r*)

Where a riot is proved to have taken place, the mere presence of a person among the rioters, even although he possessed the power of stopping the riot, and refused to exercise it, does not render him liable as one of the rioters. (*s*) In order to render him so liable, it must be shown that he did something by word or act, to take part in, help, or incite the riotous proceeding. (*t*) It is not necessary to constitute a riot that the Riot Act (*u*) should be read. Before the proclamation can be read, a riot must exist, and the effect of the proclamation will not change the character of the meeting, but will make those guilty of felony who do not disperse within an hour after the proclamation is read. (*v*)

An assemblage of persons to witness a prize fight is an unlawful assembly, and every one present and countenancing the fight is guilty of an offence. (*w*)

By the common law, every private individual may lawfully endeavor, of his own authority, and without any warrant or sanction from a magistrate, to suppress a riot, by every means in his power. He may disperse, or assist in dispersing, those assembled, and stay those engaged in it from executing their purpose, as well as stop and prevent others whom he may see coming up from joining the rest. It is his bounden duty to do this, and even to arm himself, in order to preserve the peace, if the riot be general and dangerous. If the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of a magistrate,

(*q*) *Russ. Cr.* 381; *Reg. v. Corcoran*, 26 U. C. C. P. 134.

(*r*) *Ibid.* 380.

(*s*) *Reg. v. Atkinson*, 11 Cox, 330, per *Kelly*, C. B.

(*t*) *Ibid.*

(*u*) 31 Vic., c. 70.

(*v*) *Reg. v. Furzey*, 6 C. & P. 81.

(*w*) *Reg. v. Bellingham*, 2 C. & P. 234; *Reg. v. Perkins*, 4 C. & P. 537; *Arch. Cr. Pldg.* 842-3.

it is the duty of every subject to act for himself, and upon his own responsibility, in suppressing a riotous and tumultuous assembly, and the law will protect him in all that he honestly does in prosecution of this purpose. (x) This power and duty devolve upon a governor of a colony, as well as others, in case of riot and rebellion. (y) By the 31 Vic., c. 70, s. 5, persons suppressing a riot are justified, though the death of a rioter may ensue. This is now the governing enactment as to riots throughout the Dominion.

Forcible entry or detainer.—This offence is committed by violently taking or keeping possession of lands and tenements with menaces, force, and arms, and without the authority of the law. (z) It is a misdemeanor at common law, and there is no doubt an indictment will lie at common law for a forcible entry, if accompanied by such circumstances as amount to more than a bare trespass, and constitute a public breach of the peace. (a)

The object of prosecutions for forcible entry is to repress high-handed efforts of parties to right themselves; (b) and there seems now no doubt that a party may be guilty of a forcible entry by violently and with force entering into that to which he has a legal title. (c) And it is not necessary that the force should be actual; but if the occupant of the lands have good reason to believe that sufficient force will be used to compel him to leave, and he leaves accordingly, the party menacing may be convicted of forcible entry. (d)

The stats. 8 Hy. IV., c. 9, 8 Hy. VI., c. 9, 6 Hy. VIII., c. 9, and 21 Jac. I., c. 15, as to forcible entries, seem to be in force in this country. (e)

(x) *Phillips v. Eyre*, L. R. 6 Q. B. 15, per *Willes*, J.

(y) *Ibid.*

(z) *Russ. Cr.* 421.

(a) *Reg. v. Wilson*, 8 T. R. 357; *Reg. v. Bake*, 3 Burr. 1731; *Arch. Cr. Pldg.* 851.

(b) *Reg. v. Connor*, 2 U. C. P. R. 140, per *Robinson*, C. J.

(c) *Newton v. Harland*, 1 M. & Gr. 644; *Butcher v. Butcher*, 7 B. & C. 399; 1 M. & R. 220; *Hillary v. Gay*, 6 C. & P. 248; *Russ. Cr.* 421-2.

(d) *Reg. v. Smith*, 43 U. C. Q. B. 369.

(e) *Ante*, p. 9.

Under these statutes, the party aggrieved by a forcible entry and detainer, or a forcible detainer, may proceed by complaint made to a local justice of the peace, who will summon a jury, and call the defendant before him, and examine witnesses on both sides if offered, and have the matter tried by the jury. (*f*) The party may, however, also proceed by action or by indictment at the General Sessions. (*g*) And if a forcible entry or detainer be made by three persons, or more, it is also a riot, and may be proceeded against as such, if no inquiry has before been made of the force. (*h*)

It has been held that the private prosecutor, on an indictment for forcible entry or detainer, cannot be examined as a witness, if the court may order restitution. (*i*) As this disability, however, rests solely on the ground of interest, it is, no doubt, removed in Ontario, at least, by the *Con. Stats U. C.*, c. 32. If, since the forcible entry, the prosecutor has been restored to possession, he may be a witness. (*j*)

An inquisition taken before a justice is bad if it appears to the court that the defendant had no notice, or that any of the jury had not lands or tenements to the value of forty shillings, for the 8 Hy. IV., c. 9, expressly requires that persons who are to pass on such an inquisition should have lands of that value. (*k*) The notice is not required by the 8 Hy. VI., c. 9, but the uniform course of criminal proceedings renders it necessary that, before a person shall be found a criminal, he shall be called upon to make defence; and, in addition to this principle, the courts have recognized the propriety of notice in this proceeding, on the ground that it would be wrong to put a person out of possession

(*f*) *Boswell and Loyd*, 13 L. C. R. 10, per *Maguire*, J.

(*g*) *Russ. Cr.* 428.

(*h*) *Ibid.*

(*i*) *Reg. v. Hughson*, Rob. Dig. 124; *Reg. v. Beavan*, Ry. & M. 242; *Reg. v. Williams*, 4 Man. & R. 471; 9 B. & C. 549.

(*j*) *Reg. v. Hughson*, *supra*.

(*k*) *Rex v. McKreavy*, 5 U. C. Q. B. O. S. 620.

of his house or land upon a complaint of which he has no knowledge. (*l*)

On an indictment for forcible entry or detainer of land, evidence of title in the defendant is not admissible. (*m*) Where the defendants applied for delay, in order to give evidence of title, but on the prosecutor consenting to waive restitution in the event of conviction, they were compelled to go to trial, and were convicted, a writ of restitution was afterwards refused, though it seems it would in any case have been improper to delay the trial for the reason urged. (*n*)

An inquisition for a forcible entry, taken under 6 Hy. VIII., c. 9, must show what estate the party expelled had in the premises, and if it do not, the inquisition will be quashed, and the court will order restitution. (*o*)

The 8 Hy. VI., c. 9, was construed to authorize restitution only in cases where the person expelled was seized of an estate of inheritance. The 21 Jac. I., c. 15, extends the remedy to a tenant for years; and, in the opinion of Lord Coke, the latter statute will apply to a tenant for a term less than a year. (*p*) When the inquisition finding a forcible entry is quashed, the court, upon the prayer of the party dispossessed under the justice's writ, must award a writ of restitution to place him in possession. (*q*)

It was formerly held that where the prosecutor had been examined as a witness, restitution should not be granted. (*r*) This was because the evidence Act, 16 Vic., c. 19, excluded any claimant or tenant of premises sought to be recovered in ejectment. On an indictment for forcible entry, containing two counts, one at common law and the other under the statutes, the prosecutor alleging that he had a term of years

(*l*) *Rex. v. McKreavy*, 5 U. C. Q. B. O. S. 626, per *Robinson*, C. J.

(*m*) *Reg. v. Cokeby*, 13 U. C. Q. B. 521.

(*n*) *Reg. v. Connor*, 2 U. C. P. R. 139.

(*o*) *Mitchell v. Thompson*, 5 U. C. Q. B. O. S. 620.

(*p*) *Rex v. McKreavy*, *supra*. 625, per *Robinson*, C. J.

(*q*) *Ibid.* 626, per *Robinson*, C. J.

(*r*) *Reg. v. Connor*, 2 U. C. P. R. 139.

in the land, there was a general verdict of guilty ; a writ of restitution was refused, it appearing that the lease of the land had expired. (s) Restitution cannot be awarded to one who never was in possession, or one who never has been dispossessed. (t)

The Court of Queen's Bench had at common law no jurisdiction to issue a writ of restitution, except as part of the judgment on an appeal of larceny. (u) But, by an equitable construction of the statutes, it has now a discretionary power to grant such writ. (v) A defendant, having been convicted at the Quarter Sessions on an indictment for forcible entry, was fined ; but that court refused to order a writ of restitution, and the case was removed into the Queen's Bench by *certiorari*, and a rule obtained to show cause why a writ of restitution should not be issued ; it was held in the discretion of this court either to grant or refuse the writ ; and, under the circumstances, the verdict being against the charge of the learned chairman, and he having declined to grant the writ, and the prosecutor's case not being favored, it was refused. (w)

The Court of General Sessions, where the indictment is found, may, before trial, award a writ of restitution ; but it is entirely in the discretion of the court to grant or refuse such writ. (x)

But a justice out of sessions cannot award restitution on an indictment of forcible entry, or forcible detainer, found before him by the grand jury, at the sessions. He can only do so if seized of the case out of sessions, and after inquiry before a jury, on a regular inquisition. The statement that the justices in court, or out of court, may award a writ of restitution only holds to the extent above-mentioned. (y)

(s) *Rex v. Jackson*, Draper, 53.

(t) *Boswell and Lloyd*, 13 L. C. R. 11, per *Maguire*, J.

(u) *Reg. v. Lord Mayor of London*, L. R. 4 Q. B. 371.

(v) *Mitchell v. Thompson*, 5 U. C. Q. B. O. S. 628, per *Robinson*, C. J.

(w) *Reg. v. Wightman*, 29 U. C. Q. B. 211.

(x) *Boswell and Lloyd*, 13 L. C. R. 6.

(y) *Ibid.*

If an indictment is brought at common law for a forcible entry, it is only necessary to state the bare possession of the prosecutor; but in such case no restitution follows the conviction. (z)

A mere trespass will not support an indictment for forcible entry. There must be such force, or show of force, as is calculated to prevent resistance. (a) But where the defendant, and persons with him, having entered a dwelling-house through an open door, and one of the persons having been seen to push out the windows, the defendant himself taking them off the hinges, it was held that a conviction for forcible entry should not be disturbed. (b)

A wife may be guilty of a forcible entry into the dwelling-house of her husband, and other persons also, if they assist her in the force, although her entry, in itself, is lawful. (c)

Nuisances.—A nuisance is an injury to land not amounting to a trespass. Nuisances are of two kinds, namely, public or common, and private. (d)

To constitute a public nuisance, the thing complained of must be such as, in its nature or its consequences, is a nuisance, and an injury or damage to all persons who come within the sphere of its operation, though it may be in greater or less degree. (e)

Throwing noxious matter into navigable waters is a public nuisance, and the person guilty thereof is liable to an indictment for committing a public nuisance, or to a private action, at the suit of any individual distinctly and peculiarly injured. (f) So obstructions to navigable rivers are public nuisances. (g)

The collection of a crowd of noisy and disorderly people, to the annoyance of the neighborhood, or outside grounds, in which entertainments, with music and fireworks, are given

(z) *Rex v. McKreavy*, 5 U. C. Q. B. O. S. 629, per *Sherwood*, J.

(a) *Rex v. Smyth*, 1 M. & Rob. 155; 5 C. & P. 201.

(b) *Reg. v. Martin*, 10 L. C. R. 435.

(c) *Rex v. Smyth*, 1 M. & Rob. 155; Arch. Cr. Pldg. 849.

(d) *Little v. Ince*, 3 U. C. C. P. 545, per *Macaulay*, C. J.

(e) *Ibid.*; *Reg. v. Meyers*, 3 U. C. C. P. 333, per *Macaulay*, C. J.

(f) *Watson v. City of Toronto Gas and Water Co.*, 4 U. C. Q. B. 158.

(g) *Brown and Gugg*, 14 L. C. R. 213.

for profit, is a nuisance, for which the giver of the entertainment is liable to an injunction, even although he has excluded all improper characters from the grounds, and the amusements within the grounds have been conducted in an orderly way, to the satisfaction of the police. (*h*)

It seems that a person who is annoyed by the noise of horses kicking in a stable contiguous to his dwelling, and by the stench from the manure, etc., cannot maintain an indictment to remove it. (*i*)

All disorderly houses are public nuisances, and their keepers may be indicted. (*j*) And a house to which men and women resort for the purpose of prostitution, even where no indecency or disorderly conduct is perceptible from the exterior, is a disorderly house. (*k*)

In general all open lewdness, grossly scandalous, is indictable at common law, and it appears to be an established principle that whatever openly outrages decency, and is injurious to public morals, is a misdemeanor. (*l*)

The prisoners were convicted of indecently exposing their persons in a urinal, open to the public, which stood on a public footpath in Hyde Park, and the entrance to which was from the footpath: it was held that the jury might well find the urinal to be a public place, and that, therefore, the conviction was good. (*m*)

And an indictment charging the prisoner with keeping a booth for the purpose of showing an indecent exhibition, and in another count with showing for gain an indecent exhibition, and in a third for showing an indecent exhibition in a public place, was held to show sufficiently an indictable offence. (*n*)

By the 10 & 11 Wm. III., c. 17, all lotteries are declared to be public nuisances. (*o*) Where, therefore, one hundred and

(*h*) *Walker v. Brewster*, L. R. 5 Eq. 25.

(*i*) *Laurason v. Paul*, 11 U. C. Q. B. 537, per *Robinson*, C. J.

(*j*) *Russ. Cr.* 442.

(*k*) *Reg. v. Rice*, L. R. 1 C. C. R. 21; 35 L. J. (M. C.) 93.

(*l*) *Russ. Cr.* 449.

(*m*) *Reg. v. Harris*, L. R. 1 C. C. R. 282.

(*n*) *Reg. v. Saunders*, L. R. 1 Q. B. D. 15.

(*o*) *Cronyn v. Widder*, 16 U. C. Q. B. 361, per *Robinson*, C. J.

forty-nine lots of land were sold by lottery, the person getting No. 1 ticket to have the first choice, it was held that this was a lottery, though it did not appear there was any difference in the value of the lots. The lottery consisted in having a choice of the lots, and that choice was to be determined by chance. (*p*) A sale of land by lot, in which there are two prizes, comes within the Imp. stat. 12 Geo. II., c. 28. (*q*)

So the non-repair of a highway, or the obstruction thereof, is a nuisance, indictable at common law. (*r*)

The proper remedy for a public nuisance is by indictment. And where an obstruction of a navigable river is an injury common to all the Queen's subjects who have occasion to use the stream, and is, consequently, a public nuisance, a person sustaining no actual particular damage cannot maintain an action therefor, but the proper remedy is by indictment. (*s*)

An indictment is the proper remedy in all cases, except when a charter, which is assumed to be a contract between the parties obtaining it and the public that the road will be constructed, and has been obtained to construct the road, and the work has never been done, in which latter case the proper remedy is *mandamus*.

The circumstance that the thing complained of furnishes, on the whole, a greater convenience to the public than it takes away, is no answer to an indictment for a nuisance. (*t*) As to highways, the test, irrespective of the balancing of the advantages against the impediments, is, whether the obstruction is prejudicial to the public to a degree amounting to a nuisance in fact, that is, directly, however beneficial collaterally. (*u*) Though a nuisance is erected before any person comes to live on or near the place, this does not prevent them complaining of it, on afterwards coming there. (*v*)

(*p*) *Power v. Canniff*, 18 U. C. Q. B. 403.

(*q*) *Marshall v. Platt*, 8 U. C. C. P. 189.

(*r*) *Reg. v. Corporation of Paris*, 12 U. C. C. P. 450, per *Draper*, C. J.

(*s*) *Small v. G. T. R. Co.*, 15 U. C. Q. B. 283.

(*t*) *Reg. v. Bruce*, 10 L. C. R. 117; *Reg. v. Meyers*, 3 U. C. C. P. 323, per *Macaulay*, C. J.; *Reg. v. Ward*, 4 A. & E. 384; 6 Nev. & M. 38.

(*u*) *Reg. v. Meyers*, 3 U. C. C. P. 323, per *Macaulay*, C. J.; and see *Rowe v. Titus*, 1 Allen, 328.

(*v*) *Reg. v. Brewster*, 8 U. C. C. P. 208.

In addition to the remedy by indictment, a nuisance may, in certain cases, be abated by the parties affected thereby, and this whether the nuisance is public or private, and though on the soil of another. (*w*) But a private individual cannot abate a public nuisance, unless by reason of some special inconvenience or prejudice to himself, or an occasion to require and justify it. (*x*) A boom stretched across a floatable stream or river, in a place having relation to public lands, is a public nuisance, and as such, may be abated by any person, notwithstanding Con. Stats. Can., c. 23, s. 13, for the latter only respects booms having reference to public lands. (*y*)

Where the defendant neglects to abate the nuisance, the court will compel its abatement through the sheriff. An indictment had been preferred against the defendant, in a previous term, for a public nuisance, and judgment obtained ordering its abatement, and the court, on an affidavit that the nuisance had not been abated, made a rule absolute for a precept to the sheriff to abate it. (*z*) But an order requiring the sheriff to do more than is necessary to abate, for example, to destroy, and not simply remove gunpowder improperly kept on the defendant's premises, is bad. (*a*)

A party is liable to fresh actions for continuing a nuisance. (*b*) And it may be generally stated that when a person is liable to an action for a nuisance, he may also be indicted. (*c*)

There seems to be no authority for a justice convicting a party summarily of a nuisance, and fining for the offence. (*d*) And a conviction by a magistrate for obstructing a highway,

(*w*) *Little v. Ince*, 3 U. C. C. P. 545, per *Macaulay*, C. J.

(*x*) *Ibid.* 545, per *Macaulay*, C. J.; and see *Dimes v. Petley*, 15 Q. B. 276; *Reg. v. Meyers*, *supra*, 333, per *Macaulay*, C. J.

(*y*) *Reg. v. Patton*, 13 L. C. R. 311.

(*z*) *Reg. v. Hendry*, 1 James, 105.

(*a*) *Reg. v. Dunlop*, 11 L. C. J. 186.

(*b*) *Drew v. Baby*, 6 U. C. Q. B. O. S. 240, per *Robinson*, C. J.

(*c*) *Rex v. Pedley*, 1 A. & E. 822; *Reg. v. Stephens*, L. R. 1 Q. B. 702; 35 L. J. (Q. B.) 251.

(*d*) *Bross v. Huber*, 18 U. C. Q. B. 286, per *Robinson*, C. J.

and order to pay a continuing fine until the removal of such obstruction, was held bad, as unwarranted by any Act of Parliament. (e)

Twenty years' user will not legitimate a public nuisance. (f) The maxim that no length of time will legalize such nuisance generally holds; (g) but as applied to a question of dedication, equivocal in itself, after a lapse of thirty years, without any public enjoyment, before or after suit, it forms a proper subject to be taken into consideration. (h)

Highways exist both by land and water. In Ontario, those by land have accrued to the public by dedication of the Crown, in what is commonly termed allowances for roads in the original survey of towns and townships; or by dedication of private individuals, or under the provisions of the statute law, or by usurpation and long enjoyment. Upon land, therefore, highways are established only by some positive act, indicating the object and its accomplishment. They are, it may be said, artificially made, or only become such by acts in *pais*. It is otherwise with navigable rivers and watercourses. They are *natural* highways, pre-existing and coeval with the first occupancy of the soil, and formed, practically, the first or original highways, in point of actual use. (i)

Where the existence of certain streets as public highways was shown by the work on the ground at the original survey by the Crown, and by the adoption, on the part of the Crown, of that work as exhibited on the plan thereof returned, which adoption was established by the disposition of lands according to that plan and survey: it was held that these streets thereby became public highways; and although, prior to such adoption, the Crown would not have been bound by either plan or survey, after such adoption, it was. (j)

(e) *Reg. v. Huber*, 15 U. C. Q. B. 589.

(f) *Reg. v. Brewster*, 8 U. C. C. P. 208.

(g) *Reg. v. Cross*, 3 Camp. 227; 4 Bing. N. C. 183.

(h) *Rez v. Allan*, 2 U. C. Q. B. O. S. 105, per *Macaulay*, C. J.

(i) *Reg. v. Meyers*, 3 U. C. C. P. 352, per *Macaulay*, C. J.

(j) *Reg. v. Hunt*, 17 U. C. C. P. 443, (in E. & A.)

For a period of nearly fifty years, there had been a travelled road, irregular in direction and varied at times in its course, crossing the defendant's land, which road was not laid out by any proper authority, but used by the public at pleasure, owing to the original allowances not having been opened. During two years only statute labor had been performed upon it, and when the regular allowances were opened, defendant obstructed it, other similar roads in the neighborhood having been closed in the same manner. The court held that the road could not be considered a highway, for the evidence showed not a perpetual dedication, but at most a permission to use until the proper allowance was opened, when, if not before, the defendant had a right to close it; nor was it a highway under the 29 & 30 Vic, c. 51, s. 315, now superseded, for it could not be said that statute labor had been "usually performed" upon it; and as it was, in fact, only a substitute for the regular allowance, it might fairly be treated as "altered" within the spirit of that clause when the allowance was open. (k)

Where the defendant was convicted on an indictment charging him with having obstructed a "highway" on evidence which, as reported to the court, did not show that the alleged highway had been established by a plan, filed or signed by the owners of the adjoining lots, or by the general user of the public, it having been used by one or two persons only for a short time, or that any clearly defined portion of land had been marked off and used; but there appeared to have been merely an open space, not bounded by posts or fences, over which the owners of the adjoining land had been in the habit of passing in the carriage of goods, wood, etc., to the rear of the premises; it was held that there was not sufficient evidence to support the conviction, and it was therefore quashed. (l) It has

(k) *Reg. v. Plunkett*, 21 U. C. Q. B. 536.

(l) *Reg. v. Ouellette*, 15 U. C. C. P. 290; see also *Reg. v. Sanderson*, 3 U. C. Q. B. O. S. 103, as to similar indictment under 50 Geo. III., c. 1.

been held, however, in New Brunswick to be unnecessary for the commissioners of highways in laying out streets under 5 William IV., c. 2, to put up fences or grade the road. It is sufficient if a man can go upon the ground with their return and plan, and discover where the street is, its course, length and breadth. (m)

The roads of joint-stock companies were held not public roads or highways, within the meaning of the old 22 Vic., c. 54, s. 336. (n)

Under Con. Stats. U. C. c. 54, s. 313, now repealed, the fact of the government surveyor having laid out a road in his plan of the original survey, would have made it a highway, unless there was evidence of his work on the ground clearly inconsistent with such plan. (o)

A public road, laid out in the original survey of crown lands, by a duly authorized crown surveyor, is a public highway, though not laid out upon the ground.

After a road has once acquired the legal character of a highway, it is not in the power of the Crown, by grant of the soil, and freehold thereof, to a private person, to defeat the public of their right to use the road. (p)

The defendant being indicted for overflowing a highway with water, by means of a mill dam maintained by him, objected that there was no highway, and could be no conviction, because the road overflowed, which was an original allowance, had been in some places enclosed and cultivated. It was used, however, at other points, and those who had enclosed it were anxious that it should be opened and travelled, which, they said, was impossible, owing to the overflow. The overflow was at other parts than those so enclosed. It was held by the court that the conviction was clearly right, and the 335th section of the 29 & 30 Vic., c. 51, now superseded, did not apply, because no other road had been in use in lieu

(m) *Reg. v. McGowan*, 1 Pugsley & B. 191.

(n) *Reg. v. Brown and Street*, 13 U. C. C. P. 356.

(o) *Carrick v. Johnston*, 26 U. C. Q. B. 69 ; *Reg. v. McGowan*, 1 Pugsley & B. 191.

(p) *Reg. v. Hunt*, 16 U. C. C. P. 145.

of the proper allowance, nor had any road been established by law in lieu thereof. (q)

The original public allowances for road made in the first survey of a township continued to be public highways, notwithstanding a new road deviating from any such allowance might have been opened under the provisions of the statute 50 Geo. III., c. 1, or might have been confirmed as a highway by reason of statute labor or public money having been applied upon it. (r)

But where, in the original plan of a township, a piece of ground was laid out as a highway, which was subsequently granted by the Crown, in fee, to several individuals, and was occupied by them, and others claiming under them, for upwards of thirty years, and never had been used as a highway, it was held that an indictment for a nuisance for stopping up that piece of ground, claiming it as a highway, could not be sustained. (s)

Where the Crown granted a lot of land on the bank of Lake Ontario, and along the bank of the lake, and to Lake Ontario, it was held that the Crown had power to grant the beach up to high-water mark; and in this case the grant being to a private individual, and having conveyed to him the land to the water of the lake, there was no common or public highway along the beach. (t) The actual sea shore may be granted by the Crown, and then there is no highway over it: and even when ungranted, unless by dedication, there is no highway against the will of the Crown. It would seem that in grants of land in our waters having a river or lake boundary, the grant extends to the water, and there is no place between the land conceded and the water on which to place the highway. (u)

A government survey will prevail in establishing a high-

(q) *Reg. v. Lees*, 29 U. C. Q. B. 221.

(r) *Spalding v. Rogers*, 1 U. C. Q. B. 269.

(s) *Rex v. Allan*, 2 U. C. Q. B. O. S. 90.

(t) *Parker v. Elliott*, 1 U. C. C. P. 470.

(u) *Parker v. Elliott supra*, 490, per *Sullivan, J.*

way against the right of a party in possession, to whom a patent afterwards issues. (v)

A highway, of which the origin was not clear, had been travelled for forty years across the plaintiff's lot, the patent for which was issued in 1836. The municipality, in 1866, passed a by-law shutting up the road; but no conveyance was ever made to the plaintiff; but the court held that the user for thirty years after the patent would be conclusive evidence of a dedication against the owner, and that such evidence was equivalent to a laying out by him, so that the road, under Con. Stat. U. C., c. 54, s. 336, was vested in the municipality. (w)

Under 4 & 5 Vic., c. 10, the district council could not open a new road, except by by-law; and where, therefore, no by-law was shown, it was held that the road was not sufficiently established, and upon the evidence there was nothing to show dedication. (x)

Merely opening or widening a street, for the convenience of the person doing it, or leaving land open where it is immediately adjacent to a highway, and permitting the public to use it, will not constitute a dedication. (y)

A. being owner of a large tract of land, laid out a plot for a town at the mouth of the river B., upon the map of which town a road was marked off, leading along the edge of the river, to its mouth. The road was made originally at the expense of A., but afterwards repaired and improved by statute labor and public money, and holes filled up in the part upon which the obstruction complained of was erected. After indictment, and verdict of guilty, it was held that there was sufficient evidence of intention to dedicate the street by the plan, by user and the declaration of the owner to estab-

(v) *Mountjoy v. Reg.* 10 U. C. L. J. 122.

(w) *Mytton v. Duck*, 26 U. C. Q. B. 61.

(x) *Reg. v. Rankin*, 16 U. C. Q. B. 304.

(y) *Belford v. Haynes*, 7 U. C. Q. B. 464; and see *Reg. v. Spence*, 11 U. C. Q. B. 31.

lish a dedication, and that the verdict of guilty was in accordance with the evidence. (z)

In order to prove that a way was, in fact, public, evidence was given of acts of user extending over nearly seventy years, but during the whole period the land crossed by the way had been in lease. The judge told the jury that they were at liberty, if they thought proper, to presume from these acts a dedication of the way by the defendant, or his ancestors, at a time anterior to the land being leased: and the court held the direction proper. (a)

A public highway may be established in this country by dedication and user; but if the question arises between the public and the owner of the land, in a newly settled part of the country, stronger evidence may be required than in a more settled and populous neighborhood. A right reserved to the Crown to enter on land at any time, and erect barracks, batteries, etc., does not prevent a dedication of a part of the land to the public for a highway. (b)

There may, in certain cases, be a limited or partial dedication of a road to the public. And a footway may be so dedicated, subject to the condition that the owners of the soil are to plough it up, such a right being considered reasonable, and not inconsistent with dedication. (c) So there may be a dedication of a way to the public, subject to a right of the owner of the land through which it passes to have a gate, at certain seasons, run across it. (d)

The owner, who dedicates to public use, as a highway, a portion of his land, parts with no other right than a right of passage to the public over the lands so dedicated, and may exercise all other rights of ownership not inconsistent therewith; and the appropriation made to and adopted by the

(z) *Reg. v. Gordon*, 6 U. C. C. P. 213.

(a) *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316.

(b) *Reg. v. Deane*, 2 Allen, 233; *Reg. v. Buchanan*, 3 Kerr, 674; see as to dedication by the Crown, *Cole v. Maxwell*, 3 Allen, 183.

(c) *Arnold v. Blaker*, L. R. 6 Q. B. 433 (Ex. Chr.); *Mercer v. Woodgate*, L. R. 5 Q. B. 28; 39 L. J. (M. C.) 21, affirmed.

(d) *Bartlett v Pratt*, 2 Thomson, 11.

public, of a part of the street, to one kind of passage, and another part to another, does not deprive him of any rights, as owner of the land, which are not inconsistent with the right of passage by the public. (e)

In order to constitute a valid dedication to the public of a highway, by the owner of the soil, it is clearly settled that there must be an intention to dedicate, an *animus dedicandi*, of which the user by the public is evidence, and no more ; and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment. (f)

Adoption by the public, and acquiescence, at least, if not user, are most material ingredients to constitute a binding dedication. (g)

The intention of the party to dedicate must be clear, and time is considered an essential ingredient. The act or assent of the public must be manifest and complete, and even then a subject cannot, by any spontaneous act of appropriation, impose a highway upon the public. If a highway, the public become bound to repair it, and, consequently, their adoption or assent becomes important. Such adoption and assent, in the case of allowances, are waived by the expenditure of public money in opening or repairing, the performance of statute labor, user, etc. ; but, without some evidence of adoption by user, or other manifestation, an allowance for road at common law would continue an allowance only, and not a road in fact. (h) A reservation inconsistent with the legal character of a dedication would be void. (i)

It seems there may be a public highway without its

(e) *St. Mary Newington v. Jacobs*, L. R. 7 Q. B. 53, per Mellor, J.

(f) *Mercer v. Woodgate*, L. R. 5 Q. B. 32, per Hannen, J.; *Hawkins v. Baker*, 1 Oldright, 423, per Des Barres, J.; *Leary v. Saunders*, 1 Oldright, 17.

(g) *Rex v. Inhab. St. Benedict*, 4 B. & A., 447 ; 12 Ea. 192 ; *Rex v. Allan*, 2 U. C. Q. B. O. S. 100, per Robinson, C. J.

(h) *Ibid.* 103-4, per Macaulay, C. J.

(i) *Arnold v. Blaker*, L. R. 6 Q. B. 437, per Kelly, C. B.

being a thoroughfare ; at all events, if a highway were stopped at one end so as to cease to be a thoroughfare, it would, in its altered state, continue a highway. The old doctrine that a highway implied a thoroughfare, has been so far modified by more recent decisions that there may be in a square in a great city, lighted and paved at the public expense, which the public, in fact, frequent, passing along its three sides, or to the houses therein situate, a highway in legal contemplation, although it is a *cul de sac*. (j)

But where such highway is claimed by dedication, the acts or declarations relied on to support it must be clear and unequivocal, with manifest intention to dedicate. There is a difference between a *cul de sac* in the city and one in the country ; much stronger acts being required to establish a public highway by dedication in the latter than in the former. The mere acting so as to lead persons to suppose that a way is dedicated does not amount to a dedication, if there be an agreement which explains the transaction. (k) The question of dedication or no dedication is a question of fact for the jury. (l)

Whether a certain road constitutes a highway or not is generally a mixed question of law and fact, depending much upon circumstances and the peculiar features of each case. (m) The expenditure of public money on a road laid out thirty feet wide can only make it a public highway to that extent, and will not have the effect of extending it to a highway four rods wide. (n) Where a road has been used as a public highway, and the usual statute labor of the locality done upon it from year to year, this will, in the absence of explanation, establish the road as a public high-

(j) *Hawkins v. Baker*, 1 Oldright, 419-24 ; *Rex v. Marquis of Devonshire*, 4 A. & E. 713, per Patteson, J.

(k) *Ibid.* 419 ; see also *Poole v. Huskinson*, 11 M. & W. 827 ; *Bateman v. Black*, 18 Q. B. 870 ; 21 L. J. Q. B. 406.

(l) *Belford v. Haynes*, 7 U. C. Q. B. 464 ; *Reg. v. Gordon*, 6 U. C. C. P. 213 ; *Reg. v. G. W. R. Co.*, 12 U. C. Q. B. 251, per Robinson, C. J.

(m) *Rex v. Allan*, 2 U. C. Q. B. O. S. 102, per Macaulay, J.

(n) *Basterach, v. Atkinson*, 2 Allen, 439.

way. (o) But where it appeared from the evidence that statute labor had been performed on part of the road in question, but only to a limited extent, and not from time to time, so as to show it was a road "whereon the statute labor hath been usually performed," it was held not sufficient to establish the road as a public highway under the 22 Vic., c. 54. (p) Where about fifteen years before the finding of the indictment the township council had built a bridge on the road, and expended money thereon, and statute labor had been done thereon, it was considered under the authority of s. 313 Con. Stat. U. C., c. 54, that it must be deemed a public highway. (q)

Nuisances to highways are of two classes: positive, as by obstruction; and negative, by want of sufficient repair.

Where a railway company, bound by their charter to restore any highway intersected by their track "to its former state, or in a sufficient manner not to impair its usefulness," constructed their road across a street which was sixty-six feet wide, and connected the street again by a bridge across the track forty feet two inches in width, it was held that the jury might with propriety find this to be a sufficient compliance with the Act, and that the defendants were not necessarily guilty of a nuisance because the bridge was not of equal width with the street crossed. (r)

But where a railway company, in passing over a highway, had lowered the highway at the point of intersection so as to make it inconvenient and dangerous, this was held to be an indictable nuisance. (s)

Where a street ran into a road allowance, but did not cross it, and the defendants, being incorporated under 16 Vic., c. 190, for gravelling the road, so far lowered the level, in order to get the grade prescribed by the statute, as to make the

(o) *Reg. v. Hall*, 17 U. C. C. P. 288, per *J. Wilson*, J.

(p) *Ibid.* 282, per *J. Wilson*, J.

(q) *Prouse v. Corporation of Mariposa*, 13 U. C. C. P. 560.

(r) *Reg. v. G. W. R. Co.*, 12 U. C. Q. B. 250.

(s) *Reg. v. G. T. R. Co.*, 17 U. C. Q. B. 165.

approach from this street impassable, it was held that they were justified in so doing, and not guilty of a nuisance in obstructing the street, or obliged to restore the approach. (t)

A fire lighted by a wheelwright for the purposes of his business, within fifty feet of the centre of the highway, such fire being fed by lifting a lid in the wall on the outside of the premises, is not a public nuisance within the Imp. 5 & 6 Wm. IV., c. 50, s. 72; for to constitute the act an offence within this section, it must be shown that some injury is done to the highway, or some danger or annoyance is occasioned to passengers in using it. (u)

When there has been a dedication of a highway to the public, anything afterwards done by the owner interfering with that right of way is a nuisance. (v)

The use of a velocipede on the sidewalk, though no one be near it, may be an obstruction within the provisions of a by-law that no person shall, by any vehicle, encumber or obstruct the sidewalk. (w)

In *Reg. v. Fralick*, (x) it was held under the facts stated in that case that the defendant, being the lessee of the ordinance department, had no right to obstruct the road leading to the Niagara Falls Ferry, and that he was guilty of an indictable nuisance in so doing. But where an allowance for a road has never been opened as a public highway, the notice and order required by the 9 Vic., c. 8, not being given, an indictment for a nuisance in obstructing it cannot be maintained. (y)

Where a waggon is left standing in the highway, the owner cannot exempt himself from liability by showing that the person injured thereby was drunk at the time of the accident; for it cannot be permitted to a person to place any

(t) *Reg. v. W. & D. P. & G. R. Co.*, 18 U. C. Q. B. 49.

(u) *Stinson v. Browning*, L. R. 1 C. P. 321; and see *Hadley v. Taylor*, *ibid.* 53.

(v) *Mercer v. Woodgate*, L. R. 5 Q. B. 31; per *Blackburn*, J.

(w) *Reg. v. Plummer*, 30 U. C. Q. B. 41.

(x) 11 U. C. Q. B. 340.

(y) *Reg. v. Purdy*, 10 U. C. Q. B. 545; *Reg. v. G. W. R. Co.*, 12 U. C. Q. B. 250.

obstruction that he pleases in the highway, and to consider himself responsible for no injury that may happen from it, except to persons who are sober and vigilant in looking out for nuisances that they had no reason to expect to find there. (z)

If a road is laid out over land upon which a fence is standing, it is the duty of the commissioners of highways to remove the fence, and the owner of the land omitting to do so is not punishable under the Act 5 Wm. IV., c. 2, s. 16, as for obstructing or encroaching upon a highway. (a)

A conviction for obstructing a highway is bad unless it appears on the face of it that the place was a public highway. (b)

Where a person has sold lots according to a plan in which a lane is laid out in the rear, he cannot afterwards shut up such lane, and the fact that he had previously conveyed portions of the land comprised in the lane would only affect so much as he had thus precluded himself from giving up to the public, and would not entitle him to close up the whole. (c)

C. owned township lot 32, and H. lot 31, adjoining it on the east. In 1856 H. laid out part of 31 with village lots, according to a registered plan, which showed streets called First, Second, Third and Fourth Streets, etc., running from east to west across the block to the east limit of lot 32. In 1858 C. laid out the east part of lot 32 by a plan also registered, by which a street called Augusta Street ran north and south, along the east side of 32, and from it streets ran westerly numbered 1, 2, 3, 4, etc., corresponding to and a continuation of First, Second, Third and Fourth Streets on H.'s block, Augusta Street only intervening. Village lots had been sold on street 4 in C.'s block, but none in Fourth

(z) *Ridley v. Lamb*, 10 U. C. Q. B. 354.

(a) *Ex parte Morrison*, 1 Allen, 203; and see *Cole v. Maxwell*, 3 Allen, 183.

(b) *Reg. v. Brittain*, 2 Kerr, 614.

(c) *Reg. v. Boulton*, 15 U. C. Q. B. 272.

Street on H.'s land, and the closing of this last named street would not shut out a purchaser of any lot from access to the nearest highway ; it was held that under 24 Vic., c. 49, the owner of H.'s block might, by a new survey and plan, close up Fourth Street on his land, for the laying out a street in continuation of it by C. did not make all one street, so as to render the provision in that statute applicable ; and the owner of H.'s block having been convicted at the Quarter Sessions of a nuisance for so doing, on application to this court ; and that he was therefore entitled to an acquittal. (d)

The placing of a gate across a travelled road after the public have been enjoying it for upwards of twenty years can never have the effect of abolishing a highway. It seems that a gate being kept across a public road is not conclusive to show that the road is not a public one, as the road may have originally been granted to the public, reserving the right of keeping a gate across it to prevent cattle straying. (e)

Where a road was laid out over land by the owners thereof, and was so used by the public without interruption for thirty or forty years, the court held that it had become a public highway, and could not be stopped up by by-law of the municipal council, particularly at the instance of a purchaser of one of such owners of the land, with knowledge too on his part of the existence of the road. (f)

A road had, for more than fifty years, been used as a road between the townships of York and Vaughan, the original road allowance between the townships being to the north of it, and this road being, in fact, wholly within the township of York and part of lot 25. The owner of the lot had been indicted for closing up this road, and convicted in 1870 ; and the corporation of York then passed a by-law to close it, reciting that there was no further necessity for it, by reason of the road allowance. There

(d) *Reg. v. Ribidge*, 25 U. C. Q. B. 299.

(e) *Johnston v. Boyle*, 8 U. C. Q. B. 142.

(f) *Moore v. Corporation of Requesing*, 21 U. C. C. P. 277.

being in the facts above stated sufficient evidence of dedication and acceptance of this road as a highway, the court held that it was a road dividing different townships, over which the county council only had jurisdiction, and that the by-law therefore was illegal. Such a road need not consist of an original allowance, but may be acquired or added to by purchase or dedication. (*g*)

To justify shutting up a highway under 1. Rev. Stat. (N. B.), c. 66, the return of the commissioners must show, either expressly or by necessary implication, that the road is not required for the convenience of the inhabitants of the parish. (*h*)

The commissioner of crown lands has no authority to open roads on lands granted by the Crown, and any money expended for such purpose under authority so given, is not public money, within 22 Vic., c. 54, s. 33; and the roads so opened do not, therefore, become public highways under that Act. (*i*)

A municipal corporation had power to open new roads through any person's lands, under the restrictions in the statute 12 Vic., c. 81, s. 31. (*j*) But a by-law of a municipal council for the alteration of an old road has been held bad, in not assigning any width to the new road. (*k*)

At common law, an ancient highway might be changed by writ of *ad quod damnum*. But this writ only avails so far as the rights of the Crown extend, and only in relation to rights which the Crown may grant. (*l*)

To allow a public highway to become ruinous and out of repair, is a nuisance indictable at common law. The party on whom the obligation to repair is imposed, whether by common law or otherwise, is indictable for breach of that

(*g*) *Re McBride*, 31 U. C. Q. B. 355.

(*h*) *Oulton v. Carter*, 4 Allen, 169; as to by-law to close and sell road, see *Baker and Corporation of Saltfleet*, 31 U. C. Q. B. 386.

(*i*) *Reg. v. Hall*, 17 U. C. C. P. 282.

(*j*) *Dennis v. Hughes*, 8 U. C. Q. B. 444.

(*k*) *Re Smith and Council of Euphemia*, 8 U. C. Q. B. 222.

(*l*) *Reg. v. Meyers*, 3 U. C. C. P. 321, per Macaulay, C. J.

obligation, *ad commune dñmnum*. (m) Though a statute provides that the proprietors of a road shall not collect any tolls thereon while out of repair, this does not suspend the common law right of indictment in case of non repair. (n) Where a common and public highway is impassable and out of repair, although not from accident, casualty, or emergency, a person using and passing along the highway may go through the adjoining land, going no further from the highway than is necessary, and returning thereto as soon as practicable, and doing no unnecessary damage in that behalf. (o) It would seem to make no difference whether the adjoining land be sown with grain or not. (p)

Road companies owning public highways, and entitled to tolls for the use thereof, are, upon the principles of the common law, liable to an individual lawfully using the road, and guilty of no fault on his part, for a special injury received in consequence of the company permitting the road to be out of repair; and such want of repair is also a public nuisance as respects the public at large, and the company may be liable to an indictment therefor. (q)

Grantees of the Crown of public highways are indictable at the suit of the public for default in repairing such highways, although they are also liable to the Crown for the breach of their covenant to that effect, contained in the patent; and this liability follows and accompanies the transfer of the property, so as to make the purchaser of part, or mortgagee of the residue, also indictable for the same cause, although it has been expressly agreed between grantor and grantee, that the former shall and the latter shall not be bound to repair. To maintain an indictment against the defendant under such circumstances it is not necessary that the government engineer should have first condemned the road by a certificate. (r)

(m) *Reg. v. Corporation of Paris*, 12 U. C. C. P. 450, per *Draper*, C. J.

(n) *Ibid.* 445.

(o) *Carrick v. Johnston*, 28 U. C. Q. B. 65.

(p) *Ibid.* 68, per *Hagarty*, J.

(q) *MacDonald v. Hamilton and P. D. P. L. Co.*, 3 U. C. C. P. 402.

(r) *Reg. v. Mills*, 17 U. C. C. P. 654.

A company having been formed under the provisions of the Joint-Stock Road Act in several townships, including the defendants, subsequently mortgaged said road to the counties of Lincoln and Welland, which counties, at a later date, took an absolute conveyance, and passed a by-law, by which they assumed it as a county road. They afterwards passed a by-law, requiring the respective townships (the defendant's being one of them) through which the road passed to keep the same in repair. On the trial, the defendants were found guilty. On special case left to this court it was held that the road never vested in or became a county road within the meaning of the statute, but as one acquired by the county, as assignees of the road company, and, as such assignees, they held the same, with all the rights and subject to all the duties and obligations which the law imposed upon the said company, which constructed it, and that the county had no power to divest itself of this obligation, and throw the duty of repairing on the defendants. (s)

Where a road ran through the town of Whitby, and was part of a macadamized road, made by the Government, before the 13 & 14 Vic., c. 14, and afterwards transferred to the plaintiffs, it was held that, under this statute, the corporation of the town were clearly bound to keep in repair that portion of it within their limits. (t)

Municipal corporations are, under the R. S. O., c. 174, s. 491, bound to keep all highways in the township in repair, and they have all necessary powers given to them for enabling them to perform that duty. (u) The Con. Stats. U. C., c. 49, s. 84, provides that, after any road has been completed, and tolls established thereon, the company shall keep it in repair. (v)

The Des Jardins Canal Co. having been indicted for not keeping in repair the bridge over their canal, where it

(s) *Reg. v. The Corporation of Louth*, 18 U. C. C. P. 615.

(t) *Port Whitby R. Co. v. Corporation Town of Whitby*, 18 U. C. Q. B. 40.

(u) *Colbeck v. Corporation of Brantford*, 21 U. C. Q. B. 278.

(v) *Caswell v. The St. M. & P. L. J. R. Co.*, 28 U. C. Q. B. 250, per A. Wilson, J.

crosses the highway, built for them by the Great Western Railway Company, it was held that they, and not the railway company, were bound to keep such bridge in repair; and that evidence of the state of the bridge, a few days before the trial, was admissible, not as proof of that fact, but as confirming the other witnesses, who swore to its state at the time laid in the indictment, and as showing such state by inference. (*w*)

The members of a gas company, having parliamentary powers to open streets, for the purpose of public lighting, but having no similar powers for the purpose of conveying gas to private houses, are liable to be convicted for a nuisance, in obstructing the highway, if they open the streets in order to lay down service pipes from the mains, already laid down by them for public lighting, to the houses of the adjacent inhabitants. An inhabitant who directs such service pipes to be laid down to his house is also similarly liable. (*x*)

Where a street, which was a public highway, had been once put in good repair, but at the time of the passing of the special Act was out of repair, it was held that the commissioners had no power, under s. 53, 10 & 11 Vic., c. 34, to do the necessary repairs, and charge the expenses on the adjoining occupiers, as the word "theretofore" in that section is not restricted to the time of the passing of the special Act, but is used in its ordinary sense. (*y*)

Where a highway, fifty feet in width, was set out under the General Inclosure Act, 41 Geo. III., c. 109, but only twenty-five feet were used as actual road, the sides being allowed to grow up with trees, it was held that the right

(*w*) *Reg. v. Des Jardins Canal Co.*, 27 U. C. Q. B. 374; see as to repair of hundred bridges within the English Highway Act, 1835, *Reg. v. Inhab. of Claret and Longbridge*, L. R. 1 C. C. R. 237; as to repair of public buildings, *Hawkeshaw v. District Council of Dalhousie*, 7 U. C. Q. B. 590; as to repair of roads in parishes, *Reg. v. Folville*, L. R. 1 Q. B. 213; 35 L. J. (M. C.) 154.

(*x*) *Reg. v. Knight*, 7 U. C. L. J. 23.

(*y*) *Reg. v. Great Western R. Co.*, 5 U. C. L. J. 216.

of the public was to have the whole width of the road, and not merely that part which had been used as the *via trita*, preserved free from obstructions, and that such right had not become extinguished by the fact that the trees had been allowed to grow up within the fifty feet for the period of twenty-five years. (z)

A railway company which carried the highway across and over their road by a bridge, were held bound under Con. Stats. U. C., c. 66, s. 9, subs. 5, s. 12, subs. 4, to keep in repair such bridge, and the fence on each side of it. (a)

The corporation of the county of Wellington, under 29 & 30 Vic., c. 51, s. 339, had exclusive jurisdiction over a bridge belonging to them "on the line of road and public highway between two townships in the same county," and having jurisdiction, the common law, irrespective of the statute, would impose upon them the duty of repairing it. (b)

The word "between," in the 29 & 30 Vic., c. 51, s. 329, must be construed in its popular sense; and where a bridge is constructed over navigable waters, and connects two opposite shores, lying in different counties, such bridge is between such two counties, and they are jointly answerable for its maintenance, even though the counties, as respectively containing the townships between the shores of which the current flows, reach to the middle of the water, and are divided only by the invisible untraceable line called *medium filum aquæ*. (c)

It was held not essential in a petition for survey under 12 Vic., c. 35, s. 31, that there should be a statement that the necessary number of resident landholders have applied, if, in fact, a sufficient number have joined. (d)

(z) *Turner v. Ringwood H. Board*, L. R. 9, Eq. 418.

(a) *Vanallen v. G. T. R. Co.*, 29 U. C. Q. B. 436.

(b) *Corporation of Wellington v. Wilson*, 14 U. C. C. P. 299.

(c) *Harrold v. Corporation of Simcoe*, 18 U. C. C. P. 1 (in E. & A.) S. C. 46 U. C. C. P. 43, affirmed.

(d) C. S. U. C. c. 93, s. 6; *Cooper v. Wellbanks*, 14 U. C. C. P. 364; *Reg. v. McGregor*, 19 U. C. C. P. 69.

As to public highways in the navigable rivers of this country, the civil law prevailed in the whole Province of Quebec until the division thereof in 1792. The 32 Geo. III., c. 1, which introduced into the Province of Ontario the law of England as to property and civil rights, included the law as to highways on roads and in streams. After the passing of that Act, the civil law continued applicable to Quebec. Although, in this Province, we have adopted the law of England as to public highways, yet as in other cases of our adoption of English laws, it only prevails here so far as applicable to the state and condition of this country. It is obvious that usage from time immemorial, which, in England, is a material ingredient in determining whether a river is a highway or not, could not be applied to any of the inland waters in Ontario, unless presumed in relation to the wandering tribes who may have roamed through this part of North America, before its discovery by European navigators. (*dd*)

The 32 Geo. III., c. 1, s. 3, superseded the former law of Canada (or the civil law still prevailing in the Province of Quebec), and in introducing the common law of England must be taken *proprio vigore* to have rendered all navigable waters, existing at the time of its introduction, *publici juris*, and more especially if previously entitled to have been so regarded under the abrogated law. (*e*)

This being a newly-discovered country, first occupied within the period of legal memory, and much of it even within living memory, in the application of the common law to it, positive usage immemorially, or from which prior usage immemorially might be inferred, cannot be necessary to render a naturally navigable water-course *publici juris*. When our inland streams are proved to be, in fact and in their natural state, navigable, they are *prima facie* public highways by water. In this light, user or non-user is only

(*dd*) *Reg. v. Meyers*, 3 U. C. C. P. 313 *et. seq.*, per *Macaulay*, C. J.

(*e*) *Ibid.* 346, per *Macaulay*, C. J.

material as auxiliary evidence, contributory to the inquiry whether a stream was or was not navigable from the beginning; but it does not therefore follow that it is the only medium, or an indispensable circumstance in the proof. (*f*)

In the application of the common law to Ontario, the fact of the natural capacity of the stream, and not the fact of usage, is most material to be considered. It must, of course, be determined by a court and jury, in each case as it arises, whether a water course ever was, or continued to be, a public highway, or a navigable stream, in the full and comprehensive meaning of the term, and, therefore, a public easement. The question of law for the court being what constitutes a public or navigable river, and whether there was sufficient evidence thereof, or to repel it, the question of fact for the jury being, whether, according to the *data* laid down by the court, and the evidence, it was, in fact, so navigable. (*g*)

As to the Province of Ontario, when our territory was devoted to settlement, the use of all streams practicable for navigation may be justly considered as dedicated to the public use, upon the principles of—first, the civil, and afterwards the common law; so that, although not pre-occupied by public use, they are to be looked upon as open to the public. (*h*)

In this country, streams which are not navigable continuously, but interrupted by occasional rapids, rocks, shoals, or other natural obstructions, causing what are called “portages,” are, nevertheless, throughout those portions not thus impeded, undoubtedly highways. (*i*)

Where a portion of water, forming part of Lake Ontario, at extraordinary periods when the water of the lake was pressed up at this particular part of it by strong winds, admitted of scows passing over it, but the water was not

(*f*) *Reg. v. Meyers*, 3 U. C. C. P. 347, per *Macaulay*, C. J.

(*g*) *Ibid.* 348, per *Macaulay*, C. J.

(*h*) *Ibid.* 351, per *Macaulay*, C. J.

(*i*) *Ibid.* 352, per *Macaulay*, C. J.

more than four or five feet deep, and at ordinary times it was quite shallow and fordable, it was held that this was not navigable water, and that the Crown had a right to survey and lay out a highway through this portion of water. (*j*)

It is impossible to hold that to be a natural stream or water course, which could be obstructed by the act of ploughing and harrowing land, in the ordinary course of husbandry, and a ditch in a person's land which may be so obstructed, is not a natural stream or highway. (*k*)

It was thought that a creek, whose capacity in its natural state, without improvement, during spring freshets would not permit logs, timber, etc., to float and pass down, would not be subject to public use as a navigable river, (*l*) but in a case now pending in appeal, (*ll*) it was held that streams rendered so navigable by improvement were subject to the public easement.

Navigable rivers are public highways. (*m*) It would seem that the rule of the common law of England, as to the flux and reflux of the tide being necessary to constitute a body of water navigable, does not apply to our waters; and it seems that our large lakes, and navigable rivers, and inland waters are to be viewed as navigable rivers at the common law. (*n*)

All rivers above the flow of the tide, which may be used for the transportation of property, as for floating rafts and driving timber and logs, and not merely such as will bear boats for the accommodation of travellers, are highways by water, and subject to the public use. In determining whether a river is public or private, its mere capacity during the spring freshets, or after heavy rains, to float down single sticks of timber or logs is of itself a very uncertain criterion of the public or private nature of the river, for there is no

(*j*) *Ross v. Corporation of Portsmouth*, 17 U. C. C. P. 195.

(*k*) *Murray v. Dawson*, 19 U. C. C. P. 317, per Gwynne, J.

(*l*) *Whelan v. McLachlan*, 16 U. C. C. P. 102.

(*ll*) *McLaren v. Caldwell*, 1881.

(*m*) *Gage v. Bates*, 7 U. C. C. P. 121, per Richards, C. J.; *Olivia v. Bissonnault*, S. L. C. A. 524.

(*n*) *Gage v. Bates*, 7 U. C. C. P. 121, *et seq.*, per Richards, C. J.

stream so small but which may at times suffice and be used for driving down a log or piece of timber, and, therefore, its breadth and its length and depth at ordinary times, and its capacity for floating rafts, etc., are proper to be considered. (o)

In *Essex v. McMaster* (p) it was held that a river which extended about twenty-eight miles into the country, and had been long used for navigation of boats and canoes, and for floating down logs and timber, was a common highway above where the tide flowed. All rivers above the flowing of the tide, and whether the property of the river be in the Crown or in a subject, which afford a common passage, not only for large vessels but for boats or barges, are, by the principles of the common law, public highways. (q)

The defendants under their Act of Incorporation, 19 Vic., c. 21, and as assignees of the Canada Company, claimed a right to erect any works for improving the navigation of the navigable river Maitland, and to be owners of the bed of the stream; but it was held that the powers given for that purpose were distinct from those granted for the purposes of their railway, and that, admitting the ownership, it was still subject to the public right, and that any obstruction to the highway or easement of the river for the purposes of navigation, was indictable as a nuisance. (r)

An indictment will not lie for merely erecting piers in a navigable river; it must be laid *ad commune nocentum*, and whether it was so or not must be decided by the jury. (s)

Where, on an indictment for a nuisance in obstructing the North Sydenham River and Queen's highway, by erecting a dam near lot 16, 13th concession of Sombra, the evidence showed the river in question to be affected by the waters of the St. Clair—to be navigable much higher up than the defendant's dam at some seasons, and at all seasons for some

(o) *Rowe v. Titus*, 1 Allen, 326.

(p) 1 Kerr, 501.

(q) *Ibid.* 506, per Chipman, C. J.; see also *Perley v. Dibblee*, 1 Kerr, 514.

(r) *Reg. v. B. & L. H. Ry. Co.*, 23 U. C. Q. B. 208.

(s) *Ross v. Corporation of Portsmouth*, 17 U.C.C.P. 204, per A. Wilson, J.

miles above it; that vessels and boats of a certain size had, before the erection of the dam, passed without obstruction to a point higher up the river than the part where the dam was erected, though it did not appear to have been used to any great extent higher up the river than what was called the Head of Navigation, a point below the dam: the court held that upon such evidence the jury were warranted in finding the stream to be a public navigable water-course. (t)

It would seem that the English rule that the land covered by the waters of rivers, above the flux of the tide, belongs to the riparian proprietors does not prevail here. In our waters the grant extends to the water's edge, and the land covered with water and ungranted is the property of the Crown, (u) subject to the right of the public to pass over the water in boats, and to fish and bathe therein. (v)

In an action for obstructing a river by erecting a mill-dam, it is not a proper question for the jury whether the benefit derived by the public from the mill is sufficient to outweigh the inconvenience occasioned by the dam. (w) The provisions of *Magna Charta* and other early statutes which prohibited weirs apply only to navigable rivers. (x) Weirs in such rivers are illegal, unless they existed before the time of Ed. I. (y)

The 5 & 6 Wm. IV., c. 50, s. 72, which imposes a penalty on any person riding or driving by the side of any road, only applies to footpaths by the side of roads, and not to footpaths in general. (z)

Under 27 & 28 Vic., c. 101, s. 25, the owner is liable to a penalty if cattle, sheep, etc., are found straying along any highway, notwithstanding they are under the control of a keeper at the time. (a)

(t) *Reg. v. Meyers*, 3 U. C. C. P. 305.

(u) *Parker v. Elliott*, 1 U. C. C. P. 489, per *Sullivan*, J.

(v) *Attorney General v. Perry*, 15 U. C. C. P. 329; see, however, *Fournier and Olivia*, S. L. C. A. 427.

(w) *Rose v. Titus*, 1 Allen, 326.

(x) *Leconfield v. Lonsdale*, L. R. 5 C. P. 657.

(y) *Rolle and Whyte*, L. R. 3 Q. B. 64.

(z) *Reg. v. Pratt*, L. R. 3 Q. B. 64.

(a) *Lawrence and King*, L. R. 3 Q. B. 345.

Three magistrates forming a part of the Court of Sessions, by whom the return of a precept issued under c. 62 of the revised statutes (N. B.) for laying out a road is to be decided, are not the three disinterested freeholders contemplated by that Act. (b)

The laying out of a public highway by commissioners of highways under the Act 5 Wm. IV., c. 2, does not become invalid by reason of the neglect of the commissioners to deliver a return of such laying out within three months to the clerk of the peace, as directed by the 15th section, this being only a directory provision. (c)

A municipality prosecuting an indictment for obstructing a highway is "the party aggrieved" within the 5 & 6 Wm. IV., c. 11, s. 3. (d)

On an indictment for nuisance to a highway, if the facts show it to be a proceeding substantially for the trial of a civil right, the defendants may consent that the prosecutor select three or four of them, and proceed only against the latter, the other defendants entering into a rule to plead guilty if those on trial are convicted. This course may be adopted to prevent the charges of putting them all to plead. (dd)

The Provincial Attorney-General is the proper person to file an information in respect of a nuisance caused by interference with a railway. (e)

A party cannot justify as agent of another for maintaining a public nuisance. (f) But an agent merely to let or receive rents of premises is not liable for nuisance upon the same. The case, may, however, be different where the agent is clothed with power to let, repair, and in all respects act as owner. (g) If the nuisance existed at the time of letting,

(b) *Reg. v. Chipman*, 1 Thomson, 292.

(c) *Brown v. McKeel*, 1 Kerr, 311.

(d) *Reg. v. Cooper*, 40 U. C. Q. B. 294.

(dd) *Whelan v. Reg.*, 28 U. C. Q. B. 53, per A. Wilson, J.

(e) *Attorney General v. Niagara Falls Inter. Bridge Co.*, 20 U. C. Chy. 34.

(f) *Reg. v. Brewster*, 8 U. C. C. P. 208.

(g) *Reg. v. Osler*, 32 U. C. Q. B. 324.

both tenant and owner are liable ; if after the tenancy, only the tenant. (*h*)

An indictment will lie against the corporation of a rural municipality for non-repair of a highway, although it is a front road, of which each proprietor is bound to repair his frontage. But in such case, where the corporation, after conviction, causes the road to be repaired, a merely nominal fine will be imposed, and costs will not be awarded in favor of the prosecutor. (*i*)

Where a corporation is bound by public law to repair a highway, it is sufficient in an indictment for not repairing to allege that the defendants "ought of right" to repair, etc., without setting out the particular ground of liability. (*j*)

An indictment which alleged that "the defendants or some or one of them" had put up, etc., was held bad for uncertainty. (*k*) And an allegation that a nuisance was near a certain lot, when the evidence showed it to be *on* it, was held a fatal variance. (*l*) This could now probably be amended under the 32 & 33 Vic., c. 29, s. 71.

Although a proceeding by indictment for a nuisance is criminal in form, the same evidence that would support a civil action for an injury arising from the nuisance will support the indictment. (*m*)

In *Reg. v. Rose* (*n*) it was held that the minutes of the boundary line commissioners produced in the case could not be considered a judgment within the meaning of 3 Vic., c. 11, and that the defendant should therefore have been permitted to give evidence contradicting such minutes. The second section of this Act, which provides that every such judgment shall be filed, is directory only, and the omission to file will not affect the validity of the judgment. In New Brunswick, under the 5 Wm. IV., c. 2, the return of the

(*h*) *Reg. v. Osler*, 32 U. C. Q. B. 324.

(*i*) *Reg. v. Corporation of St. Saviour*, 3 Q. L. R. 283.

(*j*) *Reg. v. Mayor of St. John*, Stev. Dig. 398.

(*k*) *Attorney General v. Boulton*, 20 U. C. Chy. 402.

(*l*) *Reg. v. Meyers*, 3 U. C. C. P. 305.

(*m*) *Reg. v. Stephens*, 2 U. C. L. J. N. S. 223 ; 14 W. R. 859.

(*n*) 1 U. C. L. J. 145.

commissioners of highways properly made and filed is evidence of the laying out of the street. (o)

A conviction for nuisance to a highway is conclusive against the defendant as to the existence of such highway, and he cannot again raise the question on an indictment for obstructing another part of the same highway. (p)

It was doubtful whether, after an indictment for nuisance to a highway had been removed by *certiorari*, and tried at the assizes upon a *nisi prius* record, and the defendants found guilty, on a motion afterwards made in term for judgment upon the conviction, the court could, under the 19 Vic., c. 43, s. 316, give judgment out of term. (q)

After a verdict of acquittal on an indictment for nuisance in obstructing a highway, tried at a Court of Oyer and Terminer, the court will refuse a *certiorari* to remove the indictment, with a view of applying for a new trial, or to stay the entry of judgment so that a new indictment may be prepared and tried without prejudice, and this though the motion is made on the part of the Crown with the assent of the Attorney General. (r) But the court will arrest the judgment on an indictment for nuisance, so that a new indictment may be preferred. (s)

After a verdict of acquittal on an indictment for nuisance tried at the assizes, a motion was made with the concurrence of the Attorney General, for a *certiorari* to remove the indictment, with a view to obtain a new trial, but no ground was shown by affidavit, and the new trial was moved for on the same day, being the fourth day of term; it was held that there was nothing to warrant the ordering of a *certiorari*, and that the motion for a new trial could not be entertained until the court were in possession of the record. (t) When the

(o) *Reg. v. McGowan*, 1 Pugsley & B. 191.

(p) *Reg. v. Jackson*, 40 U. C. Q. B. 290.

(q) *Reg. v. G. T. R. Co.*, 17 U. C. Q. B. 165, per *Robinson*, C. J.; see also 29 & 30 Vic., c. 40, s. 4, *et seq.*

(r) *Reg. v. Whittier*, 12 U. C. Q. B. 214.

(s) *Reg. v. Rose*, 1 U. C. L. J. 145; *Reg. v. Spence*, 11 U. C. Q. B. 31.

(t) *Reg. v. Gzowski*, 14 U. C. Q. B. 591.

case is tried at the assizes, the motion for a new trial need not be made within the first four days of the ensuing term, for the rule of practice requiring a party to move for a new trial within the first four days of a term only applies when the trial has been on record emanating from this court. (u)

Obstructing the execution of public justice.—A person who resists, assaults, or otherwise obstructs a constable or other peace officer in the execution of his duty, is liable to an indictment. (v) And the fact that the defendant did not know that the person assaulted was a peace officer, or that he was acting in the execution of his duty, furnishes no defence. (w) It is sufficient that the constable was actually in the execution of his duty at the time of the assault. (x)

Refusing to aid and assist a constable in the execution of his duty, in order to preserve the peace, is an indictable misdemeanor at common law. In order to support such indictment it must be proved that the constable saw a breach of the peace committed; that there was a reasonable necessity for calling on the defendant for his assistance; and that, when duly called on to do so, the defendant, without any physical impossibility or lawful excuse, refused to do so. It is no defence that the single aid of the defendant could have been of no avail. (y)

But an indictment for refusing such aid, and to prevent an assault made upon him by persons in his custody, with intent to resist their lawful apprehension, need not show that the apprehension was lawful, nor aver that the refusal was on the same day and year as the assault, or that the assault which the defendant refused to prevent was the same as that which the prisoner made upon the constable; neither is it any objection that the assault is alleged to have been made

(u) *Ibid.* 592, per Robinson, C. J.

(v) *Reg. v. McDonald*, 4 Allen, 440.

(w) *Reg. v. Forbes*, 10 Cox, 362.

(x) *Ibid.*

(y) *Reg. v. Brown*, C. & Mar. 314; Arch. Cr. Pldg. 684-5.

with intent to resist their lawful apprehension by persons already in custody. (z)

Before a party can be guilty of the offence of obstructing an officer in the execution of his duty, the latter must be acting under a proper authority. (a)

But if the process is regular, and executed by a proper officer, an obstruction, even by a peace officer, will be illegal on the established principle that if one having a sufficient authority issue a lawful command, it is not in the power of any other, having an equal authority in the same respect, to issue a contrary command, as that would legalize confusion and disorder. (b)

In an indictment for obstructing an officer of excise, under 27 & 28 Vic., c. 3, the omission in the indictment of the averment that, at the time of the obstruction, the officer was acting in the discharge of his duty, "under the authority of 27 & 28 Vic., c. 3," is not a defect of substance, but a formal defect, which is cured by verdict. (c) Where the indictment is under ss. 111 and 112, for obstruction by threats of force and violence, it is not necessary to set out the threats in the indictment, for the gist of the offence is not the meaning of the words, but the effect produced by them—namely, the obstruction. (d)

And where a revenue officer, in seizing a distillery, had also seized the outbuildings belonging to the same premises, and the proprietor entered them by force, and in doing so injured one of the employees of the Government; it was held that the proprietor had a right to enter, and that by force if necessary, and that in doing so he had committed no offence against the Government. (e)

Disobeying an order made by justices of the peace, at their sessions, in due exercise of the powers of their jurisdiction.

(z) *Reg. v. Sherlock*, L. R. 1 C. O. R. 20 ; 35 L. J. (M. C.) 92.

(a) Russ. Cr. 570 ; *Rex v. Osmer*, 5 Ea. 304.

(b) Russ. Cr. 571.

(c) *Spelman v. Reg.*, 13 L. O. J. 154.

(d) *Ibid.* 154, per *Drummond*, J.

(e) *Reg. v. Spelman*, 2 *Revue Leg.* 709.

is an indictable offence. (*f*) And, on the same principle, if an Act of Parliament give power to the Queen in Council to make a certain order, and annexes no specific punishment to the disobeying it, such disobedience is nevertheless an indictable offence, punishable as a misdemeanor at common law. (*g*) So disobedience to an order of one or more justices is an offence punishable by indictment at common law. (*h*) Every person mentioned in the order, and required to act under it, should, upon its being duly served upon him, lend his aid to carry it into effect. (*i*)

Escapes.—An escape is where one who is arrested gains his liberty, by his own act, or through the permission or negligence of others, before he is delivered by the course of the law. (*j*) If the escape is effected by the party himself, with force, it is usually called prison breach; if effected by others, with force, it is commonly called a rescue. (*k*) If a party in the custody of the law secure his own escape, though without force, he is guilty of a high contempt, and punishable by fine and imprisonment. (*l*) If a prisoner go out through an open door of his gaol, without using any force or violence, he is guilty of a misdemeanor; and it seems any person aiding him in such escape is punishable as for a misdemeanor at common law. (*m*) In order that an officer may be liable for an escape, the party must be actually arrested, and legally imprisoned for some criminal matter. (*n*) The imprisonment must also be continuing at the time of the escape, and its continuance must be grounded on that satisfaction which the public justice demands for the crime committed. (*o*) A voluntary

(*f*) *Reg. v. Russell*, 5 U.C.L.J.N.S. 132, per Cockburn, C. J.; 17 W. R. 402; Russ. Cr. 573; *Rex v. Robinson*, 2 Burr. 799-800.

(*g*) *Rex v. Harris*, 4 T. R. 202; 2 Leach, 549.

(*h*) *Rex v. Balme*, Cowp. 650; *Rex v. Fearnley*, 1 T. R. 316; *Reg. v. Gould*, 1 Salk. 381; Russ. Cr. 574.

(*i*) *Ibid.* 575; *Rex v. Gash*, 1 Starkie, 41.

(*j*) Russ. Cr. 581.

(*k*) *Ibid.*

(*l*) *Ibid.*

(*m*) *Ibid.*; *Reg. v. Allan*, 1 C. & Mar. 295.

(*n*) Russ. Cr. 582.

(*o*) *Ibid.* 583.

escape is where an officer, having the custody of a prisoner, charged with and guilty of a capital offence, knowingly gives him his liberty, with intent to save him either from his trial or execution. By this offence, the officer is involved in the guilt of the same crime of which the prisoner is guilty, and for which he was in custody. A negligent escape is where the party arrested or imprisoned escapes against the will of him that arrests or imprisons him, and is not freshly pursued, and taken again, before he has been lost sight of. (p)

In the case of a voluntary escape, the officer has no more right to retake the prisoner than if he had never had him in his custody; but in case of negligent escape, if the party make fresh pursuit he may retake the prisoner at any time afterwards, whether he finds him in the same or a different county:

Where a prisoner, charged with a misdemeanor, after examination of witnesses, was verbally remanded until the following day, in order to procure bail or in default to be committed, and on that day the defendant negligently permitted him to escape, for which he was convicted, it was held that the prisoner was not in the custody of the defendant merely for the purpose of enabling him to procure bail, but under the original warrant, and the matter still pending before the magistrates, until finally disposed of by commitment to custody, or discharged on bail, and that the conviction was proper. (q)

It is the duty of the sheriff of the county in which a city is, and not of the high bailiff of such city, to convey to the penitentiary prisoners sentenced at the Recorder's Court. (r)

It seems that from the moment a prisoner is arrested, until he has actually expiated his offence by serving the full time of imprisonment, he is in the custody of the law for the purposes of the foregoing offences, and a person in

(p) Russ. Cr. 583-4.

(q) *Reg. v. Shuttleworth*, 22 U. C. Q. B. 372.

(r) *Glass v. Wigmore*, 21 U. C. Q. B. 37.

any way aiding in his escape, before full atonement made, becomes *particeps criminis*. (s)

Prison breach seems now to be an offence of the same degree as that for which the party was confined. (t) Imprisonment is no more than a restraint of liberty, and any place, in which a party may be lawfully confined is a prison within the statute, 1 Edward II., stat. 2, for it extends to a prison in law as well as a prison in deed. (u) There must be an actual breaking of the prison and not such force and violence only as may be implied by construction of law. (v) The breaking need not be intentional; (w) but it must not be from the necessity of an inevitable accident happening without the contrivance or fault of the prisoner. (x)

The Prison Act, 1865, 28 & 29 Vic., c. 126, s. 37, which prohibits the conveyance into any prison, with intent to facilitate the escape of a prisoner, of certain articles or "any other article or thing," includes a crowbar under the latter words. (y)

Parliamentary offences.—Members of either House of Parliament are not criminally liable for any statements made in the House, nor for a conspiracy to make such statements. (z) An order for an attachment against a member of parliament is illegal and may be set aside, though no proceedings have been taken upon it, by the issue of the process or otherwise. (a) So the writ may be set aside before the defendant is actually arrested upon it. (b) A member of parliament was not liable for the penalty imposed by the Con. Stat. Can., c. 3, s. 7, for sitting and voting without having the property qualification required by law. The penalty was only exigible from a person whose incapacity to

(s) Russ Cr. 607.

(t) 1 Edward II., Stat. 2.

(u) Russ. Cr. 592.

(v) *Ibid.* 594.

(w) *Rex v. Hasoell*, Russ. & Ry. 458.

(x) Russ. Cr. 594.

(y) *Reg. v. Payne*, L. R. 1 C. C. R. 27 ; 35 L. J. (M. C.) 170.

(z) *Ex parte Wason*, L. R. 4 Q. B. 573.

(a) *Reg. v. Gamble*, 1 U. C. P. R. 222.

(b) *Ibid.*

become a member was decreed by s. 5, and whose election is radically null and void. (c) Members of provincial parliaments are privileged from arrest in civil cases for a period of forty days, after the prorogation or dissolution of parliament and for the same period before the next appointed meeting. (d) They have the same privileges in this respect as members of parliament in England. (e) But this privilege of exemption from arrest only extends to civil matters. In cases of treason, felony, refusing to give surety of the peace, all indictable offences, forcible entries or detainers, libels, printing and publishing seditious libels, process to enforce *habeas corpus*, contempts for not obeying civil process if that contempt is in its nature or its incidents criminal, and generally in all criminal matters there is no privilege of exemption from arrest. (f) A member of a provincial parliament held at Quebec, the place where he is resident, arrested eighteen days after its dissolution for "treasonable practices," and during his confinement elected a member of a new parliament, is not entitled to privilege from such arrest by reason of his election to either parliament. (g)

On motion for a writ of *habeas corpus* to produce the body of a person claiming exemption from arrest on the ground of the privilege of parliament, two papers purporting to be two indentures of election are not sufficient evidence of his being such member, to warrant the granting of the writ. (h)

After conviction for breach of privilege, in case of libel, the court will not notice any defect in the warrant of commitment. (i)

A prisoner committed by the House of Assembly to the

(c) *Morasse v. Guevremont*, 5 L. C. J. 113.

(d) *Wadsworth v. Boulton*, 2 Chr. Rep. 76; *Rennie v. Rankin*, 1 Allen, 620; *Reg. v. Gamble*, 9 U. C. Q. B. 546.

(e) *Reg. v. Gamble*, *supra*; but see *Culvillier v. Munro*, 4 L. C. R. 146.

(f) *Reg. v. Gamble*, 9 U. C. Q. B. 552, per Draper, C. J.; *Lord Wellesley's case*, Russ. and M. 639.

(g) *Re Bedard*, S. L. C. A. 1.

(h) *Ibid.*

(i) *Re Tracy*, S. L. C. A. 478.

common gaol "during pleasure" is discharged by prorogation. (j)

Courts of law cannot inquire into the cause of commitment by either House of Parliament, nor bail, nor discharge a person who is in execution by the judgment of any other tribunal; yet if the commitment should not profess to be for a contempt, but is evidently arbitrary, unjust and contrary to every principle of positive law or natural justice, the court is not only competent but bound to discharge the party. (k)

The courts have power to issue writs of *habeas corpus* in matters of commitment by either House of Parliament, and the commitment may be examined upon the return to the writ. (l)

Conspiracy to intimidate a provincial legislative body is made felony by 31 Vic., c. 71, s. 5.

(j) *Ex parte Monk*, S. L. C. A. 120.

(k) *Ex parte Lavoie*, 5 L. C. R. 99.

(l) *Ibid.*

CHAPTER IV.

OFFENCES AGAINST THE PERSON.

Murder.—Where a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the Queen's peace, with malice aforethought, either express, or implied by law, the offence is murder. (a)

Malice is a necessary ingredient in, and the chief characteristic of, the crime of murder. (b) The legal sense of the word malice as applied to the crime of murder is somewhat different from the popular acceptation of the term. When an act is attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit, a heart regardless of social duty, and deliberately bent upon mischief, the act is malicious in the legal sense. (c) In fact, malice, in its legal sense, means a wrongful act done intentionally, without just cause or excuse. (d) In general any formed design of doing mischief may be called malice, and, therefore, not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such killing as is accompanied with circumstances that show the heart to be perversely wicked is adjudged of malice prepense and consequently murder. (e)

Malice is either express or implied. Express malice is when one person kills another with a sedate, deliberate mind and formed design, and malice is implied by law from any deliberate cruel act committed by one person against another, however sudden. (f)

(a) Arch. Cr. Pldg. 623.

(b) See *Re Anderson*, 11 U. C. C. P. 62, per *Richards*, C. J.

(c) Russ. Cr. 667.

(d) *McIntyre v. McBean*, 13 U.C.Q.B. 542, per *Robinson*, C. J. ; *Poittevin v. Morgan*, 10 L. C. J. 97, per *Badgley*, J.

(e) Russ. Cr. 667.

(f) *Ibid.*

On every charge of murder, where the act of killing is proved against the prisoner, the law presumes the fact to have been founded in malice, until the contrary appears. (g) The *onus* of rebutting this presumption, by extracting facts on cross-examination or by direct testimony, lies on the prisoner. (h)

Persons present at a homicide may be involved in different degrees of guilt; for where knowledge of some fact is necessary to make a killing murder, those of a party who have the knowledge will be guilty of murder, and those who have it not of manslaughter only. A felonious participation in the act without a felonious participation in the design will not make murder. Thus if A. assault B. of malice, and they fight, and A.'s servant come in aid of his master, and B. be killed, A. is guilty of murder, but the servant, if he knew not of A.'s malice, is guilty of manslaughter only. (i)

The person committing the crime must be a free agent, and not subject to actual force at the time the act is done. Thus if A. by force take the arm of B., in which is a weapon, and therewith kill C., A. is guilty of murder but not B. But a moral force, as a threat of duress or imprisonment, or even an assault to the peril of life, is no legal excuse. (j) But if A. commit the act through an irresponsible agent, as an idiot or lunatic, A. is guilty of murder as a principal. (k)

Murder may be committed upon any person within the Queen's peace; and consequently to kill an alien enemy within the kingdom, unless in the heat and actual exercise of war, is as much murder as to kill a regular-born British subject. (l)

While an infant is in its mother's womb, and until it is actually born, it is not considered such a person as can be

(g) *Reg. v. McDowell*, 25 U. C. Q. B. 112, per *Draper*, C. J.; *Reg. v. Atkinson*, 17 U. C. C. P. 304, per *J. Wilson*, J.

(h) *Ibid.*; Russ. Cr. 669.

(i) Russ. Cr. 669.

(j) *Ibid.*

(k) *Ibid.*

(l) *Ibid.* 670.

killed within the description of murder. (m) If a woman is quick with child and any person strike her, whereby the child is killed, it is not murder or manslaughter. By the 32 & 33 Vic., c. 20, s. 59, the unlawfully administering poison, or unlawfully using any instrument, with intent to procure miscarriage, is made an offence of the degree of felony, and, by s. 60, whoever unlawfully supplies or procures any drugs or other noxious thing for such purpose is guilty of a misdemeanor. A child must be actually born in a living state before it can be the subject of murder, (n) and the fact of its having breathed is not conclusive proof thereof. (o) There must be an independent circulation in the child before it can be accounted alive. (p) But the fact of the child being still connected with the mother by the umbilical cord will not prevent the killing from being murder. (q)

The killing may be effected by shooting, poisoning, starving, drowning or any other form of death by which human nature may be overcome. (r) But there must be some external violence or corporal damage to the party, and if a person, by working upon the fancy of another, or by harsh and unkind usage, puts him into such passion of grief or fear that he dies suddenly, or contracts some disease which causes his death, the killing is not such as the law can notice. (s) But it has been held in the Province of Quebec that death caused from fear arising from menaces of personal violence and assault, though without battery, is sufficient in law to support an indictment for manslaughter. (t)

No act whatsoever shall be adjudged murder unless the person die within a year and a day from the time the stroke

(m) Russ. Cr. 670 *et seq.*

(n) *Reg. v. Poulton*, 5 C. & P. 329.

(o) *Reg. v. Sellis*, 7 C. & P. 850; 1 Mood. C. C. 850; *Reg. v. Crutchley*, 7 C. & P. 814.

(p) *Reg. v. Enoch*, 5 C. & P. 539; *Reg. v. Wright*, 9 C. & P. 754.

(q) *Reg. v. Crutchley*, *supra*; *Reg. v. Reeves*, 9 C. & P. 25; *Reg. v. Trilloe*, 2 Mood. C. C. 260; Arch. Cr. Pldg. 625-6.

(r) Russ. Cr. 674.

(s) *Ibid.*

(t) *Reg. v. McDougall*, 4 Q. L. R. 350.

was received or cause of death administered, in the computation of which the whole day on which the stroke was administered is reckoned the first. (u)

If a man has a disease which, in all likelihood, would terminate his life in a short time, and another gives him a wound or hurt which hastens his death, this will constitute murder, for to accelerate the death of a person is sufficient. (v) So if a man is wounded, and the wound turns to a gangrene or fever from want of proper applications or from neglect, and the man dies of the gangrene or fever, or if it becomes fatal from the refusal of the party to submit to a surgical operation; (w) this is also such a killing as constitutes murder, but otherwise if the death of the party were caused by improper applications to the wound, and not by the wound itself. (x)

If a person, whilst doing or attempting to do another act, undesignedly kill a man, if the act intended or attempted were a felony, the killing is murder; if unlawful but not amounting to felony, the killing is manslaughter. If a man stab at A. and by accident strike and kill B., it is murder; (y) and if A., intending to murder B., shoot at and wound C., supposing him to be B., he is guilty of wounding C. with intent to murder him, for he intends to kill the person at whom he shoots. (z)

When a man has received such a provocation as shows that his act was not the result of a cool, deliberate judgment and previous malignity of heart, but was solely imputable to human infirmity, his offence will not be murder. (a) But mere words or provoking actions or gestures expressing contempt or reproach, unaccompanied with an assault upon the person, will not reduce the killing from murder to manslaughter.

(u) Russ. Cr. 700.

(v) Arch. Cr. Pldg. 625; *Reg. v. Martin*, 5 C. & P. 130.

(w) *Reg. v. Holland*, 2 M. & Rob. 351; see also *Reg. v. Flynn*, 16 W. R. 319.

(x) Arch. Cr. Pldg. 625.

(y) *Reg. v. Hunt*, 1 Mood. C. C. 93; Arch. Cr. Pldg. 635.

(z) *Reg. v. Smith*, 2 U. C. L. J. 19; Dears. 559; 25 L. J. (M. C.) 29.

though if immediately upon such provocation the party provoked had given the other a box in the ear, or had struck him with a stick or other weapon not likely to kill, and had unfortunately and contrary to his expectation killed him, it would only be manslaughter. (b) The giving of repeated blows with a heavy stick would furnish some evidence of malice.

By the light of modern authorities, all questions as to motive, intent, heat of blood, etc., must be left to the jury, and should not be dealt with as propositions of law. (c)

P. (the prisoner) and D. (deceased) being brothers, were in the house of the latter, both a little intoxicated. D. struck his wife, and on P. interfering, a scuffle began. While it was going on D. asked for the axe, and when they let go, P. went out for it and gave it to him, asking what he wanted with it. D. raised it as if to strike P., and they again closed, when the wife hid the axe. When she came back P. was on the deceased choking him. The wife then pulled P. off. P. then got up, pulled off his coat, and went outside and squared himself and asked deceased to come out and fight, and said he was cowardly. Deceased went on to the doorstep and caught hold of the prisoner. They grappled and deceased fell undermost, prisoner on him. While the scuffle was going on D. struck P. twice. On getting up P. kicked him on the side and arm, and then ran across the garden, got over a brush fence into the road and dared D. three times to come on, saying the last time that he would not go back the same way as he came. D. seized a stick from near the stove, which had been used to poke the fire with, and ran towards P. In trying to cross the fence he fell to his knees, and P. came forward and took the stick out of his hand. He got up, and as he went over the fence towards P., the latter struck him on the head with it. The wife entreated him to spare her husband, but he struck him a second time when he fell,

(a) See Russ. Cr. 711 *et seq.*

(b) *Reg. v. McDowell*, 25 U. C. Q. B. 112, per *Draper*, C. J.

(c) *Ibid.* 115, per *Draper*, C. J.; *Reg. v. Eagle*, 2 F. & F. 827.

and again while on the ground, from which he never rose. P., in answer to the wife, said D. was not killed, and refused to take him in, saying, "Let him lie there till he comes to himself." P. and deceased had lived on friendly terms as brothers should, except when under the influence of liquor. It was held that the evidence was sufficient to go to the jury to establish a charge of murder; that if the death had been caused by the kicks received before leaving the house, the circumstances would have repelled the conclusion of malice, and the jury should have been so directed; but that whether what took place at the fence was under a continuance of the heat and passion created by the previous quarrel, was under the circumstances a question for the jury, and was to be determined by their finding or negating malice. (*d*)

Killing in a sudden quarrel, where the circumstances afford no ground for inferring malice, generally amounts to manslaughter only, but there are many authorities which establish that, in the case of a sudden quarrel, when the parties immediately fight, there may be circumstances indicating malice in the party killing, when the killing will be murder. (*e*)

A married woman having become pregnant by the prisoner, and having herself unsuccessfully endeavored to procure a poison, in order to produce abortion, the prisoner, under the influence of threats by the woman of self-destruction if the means of producing abortion were not supplied to her, procured for her a poison, from the effects of which, having taken it for the purpose aforesaid, she died. The prisoner neither administered the poison, nor caused it to be administered, nor was he present when it was taken, but he procured and delivered it to the deceased, with a knowledge of the purpose to which the woman intended to apply it, and he was accessory before the fact to her taking it for that purpose. It was held that the prisoner was not guilty of murder. (*f*)

(*d*) *Reg. v. McDowell*, 25 U. C. C. B. 108.

(*e*) *Ibid.* 114, per *Draper*, C. J.

(*f*) *Reg. v. Fretwell*, 9 U. C. L. J. 138; L. & C. 161; 31 L. J. (M. C.) 145; see 32 & 33 Vic., c. 20, s. 60.

Where, on an indictment for murder, the evidence of the medical man who examined the body went to show that he had not at all examined the brain, and that he examined the organs of the abdomen without cutting into any of them; that the fact of his having found the common carotid artery and jugular vein severed, left him in no doubt but that such severance had caused the death. Being asked, on cross-examination, if he had examined the cavity of the head—might not such examination have revealed some other cause of death? he replied: "There might have been, but the probabilities are against it."

It was contended that the Crown was bound to give the best evidence the case admitted of as to the cause of death, and that, in the present advanced state of medical science, the Crown should have placed itself, by medical examination of the brain, in a position to negative, beyond all reasonable doubt, the hypothesis of death from any other cause than that alleged; but the court held that the evidence was sufficient to justify a conviction. (g)

It was formerly necessary, in an indictment for murder, to set forth the manner in which, or the means by which, the death of the deceased was caused; and where an indictment charged the prisoner, being the mother of an infant of tender age, and unable to take care of itself, with feloniously placing it upon the shore of a river, in an exposed situation, where it was liable to fall into the water, and abandoning it there, with intent that it should perish, by means of which exposure the child fell into the river, and was suffocated and drowned, of which suffocation, etc., the child died; it was held that, to support the indictment, it was necessary to prove that the death was caused by drowning or suffocation. (h)

The 32 & 33 Vic., c. 20, s. 6, now provides that it shall not be necessary, in any indictment for murder or manslaughter,

(g) *Reg. v. Downey*, 13 L. C. J. 193.

(h) *Reg. v. Fenney*, 3 Allen, 132.

to set forth the manner in which or the means by which the death of the deceased was caused ; but it shall be sufficient, in any indictment for murder, to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill, and murder the deceased ; and it shall be sufficient in any indictment for manslaughter, to charge that the defendant did feloniously kill and slay the deceased.

It is necessary, in an indictment for murder, to state that the act by which the death was occasioned was done feloniously, and especially that it was done of malice aforethought, and it must also be stated that the prisoner murdered the deceased. (i)

The word "murder" in the indictment is emphatically a term of art, (j) and it would be insufficient, in an indictment for murder, to state that the party did wilfully, maliciously, and feloniously, stab and kill, because it is equally indispensable to use the artificial term "murder" as it is to state that the offence was committed of "malice aforethought." The omission of either one of these expressions would render the prisoner liable to a conviction for manslaughter only. (k)

In an indictment for wounding, with intent to murder, the offence must be charged to have been committed by the prisoner wilfully, maliciously, and of his malice aforethought, and judgment would formerly have been arrested where the indictment was defective in this respect. (l) Whether such omission would not now be aided by verdict is questionable.

The punishment of murder is death. (m) The 32 & 33 Vic., c. 29, s. 106, and following sections, prescribe the manner in which sentence of death is to be executed.

Manslaughter.—The general definition of manslaughter is the unlawful and felonious killing of another, without any malice either express or implied. (n) It is of two kinds :—

(i) *Re Anderson*, 11 U. C. C. P. 62, per *Richards*, C. J. ; see also 32 & 33 Vic., c. 29, s. 27, and sched. A.

(j) *Ibid.* 69.

(k) *Ibid.* 53.

(l) *Kerr v. Reg.*, 2 *Rev. Critique*, 238.

(m) 32 & 33 Vic., c. 20, s. 1.

(n) *Re Anderson*, 11 U. C. C. P. 63, per *Richards*, J.

(1) Involuntary manslaughter, where a man doing an unlawful act, not amounting to felony, by accident kills another, or where a man, by culpable neglect of a duty imposed upon him, is the cause of the death of another. (2) Voluntary manslaughter is where, upon a sudden quarrel, two persons fight, and one of them kills the other, or where a man greatly provokes another, by some personal violence, etc., and the other immediately kills him. (o)

Manslaughter is distinguished from murder in wanting the ingredient of malice; and it may be generally stated that where the circumstances negative the existence of malice, in the legal sense, and the killing is unlawful and felonious, it will amount to manslaughter.

In a case where the deceased, who complained of being robbed, suddenly, and without authority or license, entered the house where the prisoner lodged. The latter was in a bed-room below stairs, not armed with any deadly weapon, but having the fragment of a brick, and the back of a chair, in his hands. Immediately on the entry of the deceased the prisoner retreated up stairs, and the deceased asked the prisoner, who was then at the top of the stairs, if he had got his (deceased's) money, to which the prisoner replied: "If you come bothering me about your money, I will do something to you," and immediately threw out of his hand a piece of iron, several feet long, being the handle of a frying pan, which struck the deceased on the head, and fractured his skull. The whole transaction occupied only a few seconds, and was done in passion. In the opinion of the judges, this was only a case of manslaughter. (p)

The general doctrine seems well established, that that which constitutes murder, when of malice aforethought, constitutes manslaughter when arising from culpable negligence. (q) And it would seem that the doctrine of con-

(o) Arch. Cr. Pldg. 623.

(p) *Reg. v. Kennedy*, 2 Thomson, 203.

(q) *Reg. v. Hughes*, 3 U. C. L. J. 153; 29 L. T. Rep. 266; *Deara & B.* 248; 26 L. J. (M. C.) 202.

tributory negligence cannot apply so as to justify the prisoner. (r)

It is culpable negligence for one who has a right to turn out horses on a common, intersected by public paths, which he knows are unenclosed, to turn out a vicious horse, knowing the propensities of the animal to kick, so that it may kick persons passing along or close to the paths on the common; and where a child, standing upon a common, close to a public path, was kicked by a vicious horse so turned out, and death ensued, the prisoner, who turned him out, was held guilty of manslaughter. It would seem that if the child, at the time she was kicked, had been upon a part of the common more remote from the path, the prisoner's offence would have been the same. (s)

And where three persons were guilty of a breach of duty in firing at a mark without taking proper precautions, all three were held guilty of manslaughter, a boy having been killed by a shot from one of them. (t)

But in order to render a person liable to the charge of manslaughter for the act of another, there must be some sort of active proceeding on his part. He must incite, procure or encourage the act. And the mere consent to hold stakes for two persons, who have arranged to fight for a wager, cannot be said to amount to such a participation as is necessary to support such a conviction, one of the combatants having died from the effects of the fight. (u)

An indictment for manslaughter will not lie against the managing director of a railway company by reason of the omission to do something which the company by its charter was not bound to do, although he had personally promised to do it. (v)

The prisoner was convicted on an indictment charging him

(r) See *Reg. v. Dant*, *infra*; *Reg. v. Spindall*, 2 C. & K. 238; *Reg. v. Hutchinson*, 6 Cox, 555; but see *Reg. v. Berchall*, 4 F. & F. 1087.

(s) *Reg. v. Dant*, 13 W. R. 663; L. & C. 567; 34 L. J. (M. C.) 119.

(t) *Reg. v. Salmon*, L. R. 6 Q. B. D. 79.

(u) *Reg. v. Taylor*, L. R. 2 C. C. R. 147.

(v) *Ex parte Brydges*, 18 L. C. J. 141.

with neglecting to provide food and clothing for his child, but omitting specifically to allege his ability to do so. The court held that the ability to provide was implied, and therefore sufficiently averred in the use of the word "neglect." (w)

But where, in an indictment of a single woman, the mother of a bastard child, for neglecting to provide it with sufficient food, it was alleged that she neglected her duty, "during all the time aforesaid being able and having the means to perform and fulfil the said duty;" and as to that allegation, the evidence was that she was cohabiting with a man who was not the father, and there was no evidence of her actual possession of means for nourishing the child, but it was proved that she could have applied to the relieving officer of the union, and that if she had done so she would have received relief adequate to the support of the child and herself: it was held that the allegation was not proved, and that the conviction could not be supported. (x)

There is a distinction, however, between the cases of children, apprentices and lunatics, under the care of persons bound to provide for them, and the case of a servant of full age; and in charges of causing death by insufficient supply of food or unwholesome lodging in the latter, the jury must be satisfied upon the evidence that the prisoner has culpably neglected to supply sufficient food and lodging to the deceased during a time when, being in the prisoner's service, she was reduced to such an enfeebled state of body and mind as to be helpless, or was under the dominion and restraint of the prisoner, and unable to withdraw herself from his control, and that her death was caused or accelerated by such neglect. (y)

The statute imposes a positive duty to provide adequate medical aid when necessary, and if that duty be neglected by a parent, and death ensue from that neglect, the parent is guilty of manslaughter; and this even though the parent may

(w) *Reg. v. Ryland*, L. R. 1 C. C. R. 99; 37 L. J. (M. C.) 10.

(x) *Reg. v. Chandler*, 1 U. C. L. J. 135; *Deane*, 453; 24 L. J. (M.C.) 109.

(y) *Reg. v. Smith*, 13 W. R. 816; 1 U. C. L. J. N. S. 164.

have *bona fidé* believed it wrong to call in medical assistance. However this latter consideration might affect the question at common law, the statute is imperative. (z)

If a man kill an officer of justice, either civil or criminal, such as a bailiff, constable, etc., in the legal execution of his duty, or any person acting in aid of him, whether specially called thereunto or not, or any private person endeavoring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice and the offender will be guilty of murder. (a) But the officer must have a legal authority and execute it in a proper manner, and the defendant must have knowledge of that authority and intention; (b) otherwise the killing will amount to manslaughter only. (bb)

The 32 & 33 Vic., c. 29, s. 2, empowers a constable or peace officer to apprehend, without warrant, any person found committing an offence punishable either by indictment or upon summary conviction. Where a person was supposed to have obtained money by false pretences at 1 p. m. and was not arrested until 10 p. m., it was held that the party was "found committing" the offence at 1 p. m. and might be arrested, when found committing or after a pursuit immediately commenced. But "immediately" means after the commission of the offence and not after its discovery, for the intention of the statute was that the criminal should be apprehended immediately on the commission of the offence. (c)

Where an offence was committed in the county of G., and warrants were issued for the arrest of the guilty parties, persons from another county, who came to assist the constable of the county of G. in making arrests, were held entitled to the same protection as the constables. (d)

A person found committing an offence against the Larceny

(z) *Reg. v. Downes*, L. R. 1 Q. B. D. 25.

(a) Arch. Cr. Pldg. 640.

(b) *Ibid.*

(bb) See *Infra*.

(c) *Downing v. Chapel*, L. R. 2 C. P. 461.

(d) *Reg. v. Churson*, 3 Fagsley, 546.

Act, 32 & 33 Vic., c. 21, may be immediately apprehended by any person without a warrant, provided, according to the rule laid down in *Herman v. Seneschal*, (e) and adopted in *Roberts v. Orchard*, (f) the person so apprehending honestly believes in the existence of facts which, if they existed, would have justified him under the statute 24 & 25 Vic., c. 96, s. 103. It is not necessary that an offence should have been committed under the statute by any one; but the belief must rest on some ground, and mere suspicion will not be enough. (g)

The Police Act (N. B.), 11 Vic., c. 13, s. 22, does not authorize the arrest without warrant of known residents of the place. (h)

In *King v. Poe*, (i) it was left undecided and in doubt whether a magistrate has a right to arrest a person for a misdemeanor committed in his view. Where there has been no breach of the peace, actual or apprehended, a magistrate has no right to detain a known person to answer a charge of misdemeanor, verbally intimated to him, without a regular information before him in his capacity of magistrate, that he may be able to judge whether it charges any offence to which the party ought to answer. (j)

A constable may arrest any one for a breach of the peace committed in his presence, not merely to preserve the peace, but for the purposes of punishment. (k) Therefore, where a policeman saw a man, who was drunk, assault his wife, and within twenty minutes after took him into custody, it was held that the policeman was justified in so doing, notwithstanding that the man had left the spot, where his wife was saying he should "leave her altogether." (l)

(e) 11 W. R. 184; 13 C. B. N. S. 392.

(f) 12 W. R. 253; 2 H. & C. 768.

(g) *Leete v. Hart*, 4 U. C. L. J. N. S. 201.

(h) *Foley v. Tucker*, 1 Hannay, 52.

(i) 15 L. T. Rep. N. S. 37.

(j) *Caudle v. Ferguson*, 1 Q. B. 889; *Rex v. Birnie*, 1 M. & R. 160.

(k) *Deercourt v. Corbishley*, 1 U. C. L. J. 156.

(l) *Reg. v. Light*, 4 U. C. L. J. 97; *Dears. & B.* 332; 27, L. J. (M. C.) 1.

A constable may arrest a person without a warrant upon a reasonable charge; that is, upon probable information that he has committed a crime. (m)

It would appear that a constable has nothing to do *virtute officii* in a civil proceeding, and he can have no color or pretence for acting without authority specially given by some process. (n)

It is the duty of a person arresting any one on suspicion of felony to take him before a justice of the peace as soon as he reasonably can; and the law gives no authority, even to a justice of the peace, to detain a person suspected but for a reasonable time till he may be examined. (o) A private person not being by office a keeper of the peace, or a justice or constable, cannot arrest on suspicion of felony without a warrant, but must show a felony actually committed. (p)

But if a person is prepared to show that there really has been a felony committed by some one, then he may justify arresting a particular person upon reasonable grounds of suspicion that he was the offender. (q) The general rule would seem to be that, at common law, if a felony were actually committed, a person might be arrested without a warrant by any one, if he were reasonably suspected of having committed the felony; and if a constable had reasonable grounds for supposing that a felony had been committed, and reasonable grounds for assuming that a certain person had committed the supposed felony, he might arrest him, though no felony had actually been committed. (r) Neither a constable nor any other could arrest a person merely on suspicion of his having illegally detained goods. (s)

A clerk in the service of a railway company, whose duty it is to issue tickets to passengers and receive the money, and

(m) *Rogers v. Van Valkenburgh*, 20 U. C. Q. B. 219, per *Robinson*, C. J.

(n) See *Brown v. Shea*, 5 U. C. Q. B. 143, per *Robinson*, C. J.

(o) *Ashley v. Dundas*, 5 U. C. Q. B. O. S. 754, per *Sherwood*, J.

(p) *Ibid.*; *McKenzie v. Gibson*, 8 U. C. Q. B. 100; *Murphy v. Ellis*, *Stev. Dig.* 115.

(q) *McKenzie v. Gibson*, *supra*, 102, per *Robinson*, C. J.

(r) *Hadley v. Perks*, L. R. 1 Q. B. 456, per *Blackburn*, J.

(s) *Ibid.*

keep it in a till under his charge, has no implied authority from the company to give into custody a person whom he suspects has attempted to rob the till, after the attempt has ceased, as such arrest could not be necessary for the protection of the company's property. (t) It would seem that, if a man in charge of a till were to find that a person was attempting to rob it, and he could not prevent him from stealing the property otherwise than by taking him into custody, the person in charge of the till might have an implied authority from his employer to arrest the offender; or if the clerk had reason to believe the money had been actually stolen and he could get it back by taking the thief into custody, and he took him into custody with a view of recovering the property taken away, that also might be within the authority of a person in charge of the till. But there is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. The person having charge, etc., has no implied authority to take such steps as may be necessary for the purpose of punishing the offender. The principle governing the subject is: there is an implied authority to do all those things that are necessary for the protection of property entrusted to a person, or for fulfilling the duty which a person has to perform. (u)

Where a man is himself assaulted by a person disturbing the peace in a public street, he may arrest the offender, and take him to a peace officer to answer for a breach of the peace. (v)

The fact that a party is violently assaulting the wife and child of another is no legal justification for the latter, not

(t) *Allen v. L. & S. W. Ry. Co.*, L. R. 6 Q. B. 65.

(u) *Ibid.* 68-9, per *Blackburn*, J.

(v) *Forrester v. Clarke*, 3 U. C. Q. B. 151.

being a peace officer, breaking into the house of the former in order to prevent the breach of the peace. (*w*)

The prisoner assaulted a police constable in the execution of his duty. The constable went for assistance and, after an interval of an hour, returned with three other constables, when he found that the prisoner had retired into his house, the door of which was closed and fastened; after another interval of fifteen minutes, the constable forced open the door, entered and arrested the prisoner, who wounded one of them in resisting his apprehension. It was held that as there was no danger of any renewal of the original assault, and as the facts of the case did not constitute a fresh pursuit, the arrest was illegal. (*x*)

A person unlawfully in another's house, and creating a disturbance and refusing to leave the house, may be forcibly removed, but, if he had not committed an assault, the circumstances do not afford a justification for giving him into the custody of a policeman. (*y*)

In all cases above mentioned, if the officer has not a legal authority or executes it in an improper manner, the offence will be manslaughter only. But if there is evidence of express malice it will amount to murder. (*z*) So ignorance of the character in which the officer is acting will reduce the offence to manslaughter. But if a constable command the peace or show his staff of office, this, it seems, is a sufficient intimation of his authority (*a*)

Where the fact of killing is proved, the defendant may rebut the presumption of malice arising therefrom, by proving that the homicide was justifiable or excusable.

Justifiable homicide is of three kinds:—1. Where the proper officer executes a criminal in strict conformity with his sentence. 2. Where an officer of justice, or other person

(*w*) *Rockwell v. Murray*, 6 U. C. Q. B. 412; *Handcock v. Baker*, 2 B. & P. 262.

(*x*) *Reg. v. Marsden*, L. R. 1 C. C. R. 131; 37 L. J. (M. C.) 80.

(*y*) *Jordan v. Gibbon*, 3 F. & F. 607.

(*z*) Arch. Cr. Pldg. 645-6.

(*a*) *Ibid.* 645; and see *Rex v. Higgins*, 4 U. C. Q. B. O. S. 83.

acting in his aid in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it. 3. Where the homicide is committed in prevention of a forcible and atrocious crime, as, for instance, if a man attempts to rob or murder another and be killed in the attempt, the slayer shall be acquitted and discharged. (b)

Excusable homicide is of two kinds:—1. Where a man doing a lawful act, without any intention of hurt, by accident kills another, as, for instance, where a man is working with a hatchet, and the head by accident flies off and kills a person standing by. This is called homicide *per infortunam* or by misadventure. 2. Where a man kills another, upon a sudden encounter, merely in his own defence, or in defence of his wife, child, parent, or servant, and not from any vindictive feeling, which is termed homicide *se defendendo*, or in self-defence. (c)

The 32 & 33 Vic., c. 20, s. 7, provides that no punishment or forfeiture shall be incurred by any person who kills another by misfortune, or in his own defence, or in any other manner, without felony.

Concealing Birth.—The 32 & 33 Vic., c. 20, sec. 62, repeals the 21 Jac. I.; and sec. 61 of the same statute enacts that if any woman is delivered of a child, every person who, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavors to conceal the birth thereof, is guilty of a misdemeanor.

A secret disposition, under this Act, must depend upon the circumstances of each particular case; and the most complete exposure of the body might be a concealment, as, for instance, if the body were placed in the middle of a moor in the winter, or on the top of a mountain, or in any other secluded place, where it would not likely be found. The

(b) Arch. Cr. Pldg. 623.

(c) *Ibid.* 623.

jury must, in each case, say whether or no the facts show that there has been such a secret disposition. (*d*)

The conduct of the prisoner, such as the denial on her part that she has had a child, is important as showing the intent with which a concealment, otherwise questionable was made. (*e*)

If a woman endeavor to conceal the birth of her child by placing the dead body under the bolster of a bed, and laying her head partly over the body, intending to remove it to some other place when an opportunity offers, it is an offence within 9 Geo. IV., c. 31, s. 14. (*f*)

Abortion.—This offence is now regulated by the 32 & 33 Vic., c. 20, ss. 59 and 60. Upon an indictment for causing abortion, it was proved that the woman requested the prisoner to get her something to procure miscarriage, and that the drug was both given by the prisoner, and taken by the woman, with that intent, but the taking was not in the presence of the prisoner. It produced a miscarriage. The court held that a conviction upon the facts above was right, and that there was an "administering and causing to be taken," within the statute, though the prisoner was not present at the time. (*g*)

What is a "noxious thing" within the statute, depends on the circumstances of each particular case. In one case, evidence that quantities of oil of juniper, considerably less than half an ounce, are commonly taken medicinally without any bad results, but that a half ounce produces ill effects, and is to a pregnant woman dangerous, was held sufficient from which a jury might infer that the latter quantity was a "noxious thing" within the statute. (*h*)

(*d*) *Reg. v. Brown*, L. R. 1 C. C. R. 246-7; 39 L. J. (M. C.) 94, per Bovill, C. J.; *Reg. v. Piché*, 30 U. C. C. P. 409.

(*e*) *Reg. v. Piché*, 30 U. C. C. P. 409.

(*f*) *Reg. v. Perry*, 1 U. C. L. J. 135; Dears. 471; 24 L. J. (M. C.) 137.

(*g*) *Reg. v. Wilson*, 3 U. C. L. J. 19; Dears. & B. 127; 26 L. J. (M. C.) 18; see also *Reg. v. Farrow*, Dears. & B. 164.

(*h*) *Reg. v. Cramp*, L. R. 5 Q. B. D. 307.

And where it was in evidence that oil of savin in any dose would be most dangerous to give to a pregnant woman ; that the prisoner, with intent to procure abortion, had supplied a woman in that condition with a bottle of Sir. James Clarke's female pills, containing about four grains of that drug, and that such a quantity would be very irritating : the court held that there was a supplying of a "noxious thing." (i)

Rape.—This offence has been defined to be the having unlawful and carnal knowledge of a woman by force, and against her will. (j)

Upon an indictment for rape, there must be some evidence that the act was without the consent of the woman, even where she is an idiot. Where there is no appearance of force having been used to the woman, and the only evidence of the connection is the prisoner's own admission, coupled with the statement that it was done with her consent, there is no evidence for the jury. (k)

It was formerly held that where the woman consents to the connection, through the fraud of the ravisher, the act does not amount to rape ; (l) but the soundness of this doctrine has lately been questioned in England, and seems inconsistent with the modern doctrines to consent in criminal law in general. The following proposition, it is submitted, correctly sets out the law on the subject: Where a person does or acquiesces in an act through a misapprehension of the nature of that act, or of the circumstances attending it, and that misapprehension is either induced by the prisoner, or the prisoner, knowing the mistake under which the other is laboring, takes advantage of that mistake, there is no consent in law, but that quality of crime is to be imputed to the prisoner of which he would have been guilty had he done the act against the expressed will of the other.

(i) *Reg. v. Stitt*, 30 U. C. C. P. 30.

(j) *Russ. Cr.* 904.

(k) *Reg. v. Fletcher*, L. R. 1 C. C. R. 39 ; 35 L. J. (M. C.) 172.

(l) *Reg. v. Barrow*, L. R. 1 C. C. R. 156 ; 38 L. J. (M. C.) 20.

Thus, on an indictment for indecently assaulting two boys, the judge left it to the jury to say whether the boys merely submitted to the acts ignorant of what was going to be done to them, or of the nature of what was being done, or if they exercised a positive will about it and consented to the prisoner's acts; and on a case reserved, the court held the action right. (m)

And where the prisoner, a depositor in the Post Office Savings Bank, in which 11s. stood to his credit, gave notice in the ordinary form to withdraw that sum, and the clerk, at the office of payment, referring by mistake to another letter of advice for £8 16s. 10d., placed the latter amount upon the counter and entered the same as paid in the prisoner's deposit book, which sum the prisoner took up, *animo furandi*; it was held by a majority of the judges for conviction, that such a delivery by the clerk under mistake, though with an intention of passing the property, had not that effect, and that there was a sufficient taking to warrant a conviction for larceny. (n)

And in a case of rape, in which the authority of *Reg. v. Barrow* (nn) was doubted, the prisoner professed to give medical and surgical advice for money. The prosecutrix, a girl of nineteen, consulted him with respect to an illness from which she was suffering. He advised her that a surgical operation should be performed, and under pretence of performing it, he had carnal knowledge of her. She submitted to what was done, not with any intention that he should have sexual connection with her, but under the belief that he was merely treating her medically and performing a surgical operation, that belief being wilfully and fraudulently induced by the prisoner. He was held guilty of rape. (o)

This case, it is true, differs from *Reg. v. Barrow* in that there the prosecutrix knew the nature of the act and consented to it under the mistaken belief that the person having

(m) *Reg. v. Lock*, L. R. 2 C. C. R. 10.

(n) *Reg. v. Middleton*, L. R. 2 C. C. R. 38.

(nn) L. R. 1 C. C. R. 156; 38 L. J. (M. C.) 20.

(o) *Reg. v. Flattery*, L. R. 2 Q. B. D. 410.

connection with her was her husband, while here the mistake was as to the nature of the act itself. But the distinction is verbal rather than substantial ; and, besides, the principle of *Reg. v. Barrow* conflicts with that of *Reg. v. Middleton*, which embodies the approved doctrine on the subject in cases of larceny.

Apart from all questions of consent fraudulently obtained, the meaning of the phraseology in an indictment for rape that the prisoner "violently, and against her will, feloniously did ravish" the prosecutrix, is, that the woman has been quite overcome by force or terror, accompanied with as much resistance on her part as is possible under the circumstances, and so as to make the ravisher see and know that she is really resisting to the uttermost. (oo)

Thus, where, on an indictment for rape, the evidence of the prosecutrix showed that the prisoner, having followed her into the house, and, without her knowledge, bolted the door, succeeded, after she had several times escaped from him, in dragging and throwing her upon the bed, where he had connection with her, she making several attempts to get up, but being too exhausted to do so, the prisoner avowing that he had come on purpose, and, as she was in his power, he would do as he pleased ; that she resisted as long as she could, and then, before he had effected his purpose, screamed out, and called to her child, who was outside ; being corroborated as to the screams by the child, and by another witness, who heard cries, manifestly those of the prosecutrix ; it also appearing that the husband of the prosecutrix had received a letter from her, on the 20th of the same month in which the rape was said to have been committed, which, it was alleged, was on the 17th of that month, stating that the prisoner had been at his house and abused her. It was held that this evidence showed the woman was quite overcome by force or terror, accompanied with as much resistance on her part as was possible under the circumstances, and so as to have made

(oo) *Reg. v. Fick*, 16 U. C. C. P. 379.

the ravisher see and know that she really was resisting to the utmost, and sustained the language of the indictment, that the prisoner "violently, and against her will, feloniously did ravish" the prosecutrix. A conviction for rape was therefore upheld. (p)

Where the prisoner forcibly had carnal knowledge of a girl thirteen years of age, who, from defect of understanding, was incapable of giving consent or exercising any judgment in the matter, it was held that he was guilty of rape, and that it was sufficient, in such a case, to prove that the act was done without the girl's consent, though not against her will. (q)

But in the case of rape of an idiot, or lunatic woman, the mere proof of the act of connection will not warrant the case being left to the jury. There must be some evidence that it was without her consent, *e. g.*, that she was incapable of expressing assent or dissent, or from exercising any judgment upon the matter, from imbecility of mind or defect of understanding, and if she gave her consent from animal instinct or passion, (r) or if from her state and condition he had reason to think she was consenting, it would not be a rape. (s)

A child, under ten years of age, cannot give consent to any criminal intercourse, so as to deprive that intercourse of criminality, under the 32 & 33 Vic., c. 20, s. 51. (t) And a person may be convicted of attempting to have carnal knowledge of such child, even though she consents to the acts done. (u) But her consent will render the attempt no assault. (v)

In the case of girls from ten to twelve, on a charge of

(p) *Reg. v. Fick*, 16 U. C. C. P. 379.

(q) *Reg. v. Fletcher*, 5 U. C. L. J. 143; Bell, 63; 28 L. J. (M. C.) 85.

(r) *Reg. v. Connolly*, *supra*, 317.

(s) *Reg. v. Barratt*, L. R. 2 C. C. R. 81; *Reg. v. Fletcher*, L. R. 1 C. C. R. 39, explained.

(t) *Reg. v. Connolly*, *supra*, 320, per *Hagarty*, J.

(u) *Reg. v. Beale*, L. R. 1 C. C. R. 10; 35 L. J. (M. C.) 60.

(v) *Reg. v. Cockburn*, 3 Cox, 543; *Reg. v. Connolly*, *supra*, 320, per *Hagarty*, J.

assault, with intent to carnally know, or indecent assault, or common assault, consent is a defence; but the prisoner may be indicted for attempting to commit the statutable misdemeanor, not charging an assault, in which case it seems consent is no defence. The proper course is to indict for attempt to commit the statutable misdemeanor, for every attempt to commit a misdemeanor is a misdemeanor, and where the essence of the offence charged is an assault, the attempt, though a misdemeanor, is no assault. (*w*)

By the 32 & 33 Vic., c. 20, s. 65, it is unnecessary, with respect to these offences, to prove the actual emission of seed, in order to constitute a carnal knowledge; but the carnal knowledge shall be deemed complete on proof of any degree of penetration only.

In a case of rape, a statement made by the prosecutrix to her husband and another person, that the defendant ravished her, is not admissible, so far as it criminales the prisoner. (*x*)

The 32 & 33 Vic., c. 20, s. 56, provides that whosoever unlawfully takes, or causes to be taken, any unmarried girl being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, is guilty of a misdemeanor.

The prisoner met a girl in the street going to school and induced her to go with him to a town some miles distant, where he seduced her. They returned together, and he left her where he had met her. The girl then went to her home, where she lived with her father and mother, having been absent some hours longer than would have been the case if she had not met the prisoner. The latter made no inquiry, and did not know who the girl was, or whether she had a father or mother living or not, or that he was taking her out of her father's possession; but he had no reason to, and

(*w*) *Reg. v. Connolly*, 26 U. C. Q. B. 323, per *Hagarty, J.*; see also *Reg. v. Guthrie*, L. R. 1 C. C. R. 241; 39 L. J. (M. C.) 95; *Reg. v. Oliver*, Bell, 287; 30 L. J. (M. C.) 12.

(*x*) *Reg. v. Fick*, 16 U. C. C. P. 379.

did not, believe that she was a girl of the town. It was held that the prisoner was not guilty of having unlawfully taken the girl out of the possession of her father, under the Imperial 24 & 25 Vic., c. 100, s. 55, which is analogous to our own Act, for it did not appear that the prisoner knew or had reason to believe that the girl was under the lawful care or charge of her father or mother or any other person. (y) But this decision seems questionable, for the statute does not make knowledge an ingredient of the offence, and in a later case on a similar charge, where it was proved that the prisoner *bona fide* believed, and had reasonable ground for believing, that the girl was over sixteen though in fact under that age, it was held that the statute was express, and that his belief would not affect his criminality. (z)

Assault and battery.—An assault is an attempt or offer with force and violence to do a corporal hurt to another, and a battery, which is the attempt executed, includes an assault. (a) An assault is described as a violent kind of injury offered to a man's person of a more large extent than battery, for it may be committed by offering a blow. (b)

Whether the act shall amount to an assault must in every case be collected from the intention. If a person interfere in a fight to separate the combatants, this does not amount to an assault. (c) So to lay one's hand gently on another whom an officer has a warrant to arrest, and to tell the officer that this is the man he wants, is no battery. If the injury committed were accidental and undesigned, it will not amount to a battery. (d)

Using insulting and abusive language to a person in his own office and on the public street, and using the fist in a

(y) *Reg. v. Hibbert*, L. R. 1 C. C. R. 184; 38 L. J. (M. C.) 61.

(z) *Reg. v. Prince*, L. R. 2 C. C. R. 154; and see *Reg. v. Downes*, L. R. 1 Q. B. D. 25.

(a) *Reg. v. Shaw*, 23 U. C. Q. B. 619, per *Draper*, C. J.

(b) *McCurdy v. Swift*, 17 U. C. C. P. 139, per *A. Wilson*, J.

(c) *Russ. Cr.* 1025.

(d) *Ibid.*

threatening and menacing manner to the face and head of a person, amounts to an assault. (e)

A conductor on a train is not liable for an assault, in attempting to put a person off the cars who refuses, after being several times requested, to pay his proper fare; the conductor, in endeavoring to put the person off, being successfully resisted, and the person paying his proper fare on the conductor summoning others to his aid. (f)

To discharge a pistol loaded with powder and wadding at a person within such a distance that he might have been hit is an assault. (g)

A municipal corporation is liable for assaults committed by its servants, such as policemen, when the assaults are proved, and attempted to be justified by the corporation. (h)

If a warrant of commitment is good on its face, and the magistrate issuing it had jurisdiction on the case, it is a justification to a constable executing it, and a person resisting him is guilty of an assault. (i)

Where A., without any hostile intention, pulled the arm of B., the superintendent of a fire brigade, the moment the latter was engaged in directing the hose of the engine against a fire, for the purpose of calling his attention to an observation with the respect to the effect of the water upon the flames, it was held that this was not such an assault as would justify B. in giving A. into the custody of a policeman. (j) There can be no assault where the party consents to the act done. (k)

On an indictment that the prisoner, in and upon one D., a girl above the age of ten years, and under the age of

(e) *Reg. v. Harmer*, 17 U. C. Q. B. 555; *Stephens v. Meyers*, 4 C. & P. 350.

(f) *Reg. v. Peneuf*, 5 L. C. J. 167.

(g) *Reg. v. Cronan*, 24 U. C. C. P. 106.

(h) *Corporation of Montreal v. Doolan*, 13 L. C. J. 71; 18 L. C. J. 124.

(i) *Reg. v. O'Leary*, 3 Pugsley, 284.

(j) *Coward v. Baddeley*, 5 U. C. L. J. 262; 4 H. & N. 478; 28 L. J. (Ex.) 260.

(k) *Reg. v. Guthrie*, L. R. 1 C. C. R. 243; 39 L. J. (M. C.) 95, per *Bovill*, C. J.; and see *Reg. v. Beale*, *ibid.* 12, per *Pollock*, C. B.; *Reg. v. Connolly*, 26 U. C. Q. B. 320, per *Hagarty*, J.

twelve years, unlawfully did make assault, and her, the said D., did then unlawfully and carnally know and abuse against the form of the statute, etc. The offence of carnally knowing the girl was disproved, but there was evidence of an assault of an indecent and very violent character, which was left to the jury, who found the prisoner guilty of a common assault, and the question was whether they could properly do so upon this indictment; it was held that the prisoner was properly convicted of a common assault, on the ground that, the indictment charged two distinct misdemeanors, namely, an assault at common law, and the statutory offence of unlawfully and carnally knowing and abusing the girl; that there being a distinct charge of an assault in the indictment, the prisoner might be convicted of it though the indictment also contained a charge of a more serious offence, consequently the prisoner might be found guilty of either offence. (l)

A charge of assaulting and beating is not a charge of aggravated assault, and a complaint of the former will not sustain a conviction of the latter, under 32 & 33 Vic., c. 32, though when the party is before the magistrate, the charge of aggravated assault may be made in writing, and followed by a conviction therefor. (m)

The prisoner was found guilty at the Quarter Sessions, on an indictment charging that she, on, etc., in and upon one B., in the peace of God and of our Lady the Queen then being, unlawfully did make an assault and him, the said B., did beat and ill-treat with intent him, the said B., feloniously, wilfully, and of her malice aforethought, to kill and murder, and other wrongs to the said B. then did; to the great damage of the said B., against the form of the statute in such case made and provided, and against the peace, etc. A count was added for common assault. The evidence showed an attempt to murder, but it was moved, in arrest of judgment, that the

(l) *Reg. v. Guthrie*, L. R. 1 C. C. R. 241.

(m) *Re McKinnon*, 2 U. C. L. J. N. S. 324.

sessions had no jurisdiction, for that it was a capital crime within the Con. Stats. Can., c. 91, s. 5. The court held that the indictment did not charge a capital offence under that section, nor an offence against any statute, but charged in each count an offence at common law, rejecting from the first count the words "contrary to the statute" as surplusage, and any other words which were insufficient to sustain a prosecution for felony under any statute, and that the conviction might be sustained as for an assault at common law. (n)

The 32 & 33 Vic., c. 29, s 51, provides that on the trial of any person for any felony whatever, where the crime charged includes an assault against the person, the jury may acquit of the felony and find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding. It is quite clear that this section only authorizes a verdict of guilty of assault, when it is included in, and forms parcel of, the felony charged in the indictment. The words "crime charged" mean the crime charged as felony in the indictment, for the enactment only takes effect upon an acquittal, and the assault, to fall within the Act, must be an integral part of the felony charged. (o) Therefore, where on an indictment for murder the jury found the prisoner guilty of an assault only, and that such assault did not conduce to the death of the deceased, it was held that the prisoner under such finding could not be convicted of the assault. (p)

And where the prisoners were indicted for murder, and the medical testimony showed burning to be the direct and only cause of the death, but there was no evidence to connect any of the prisoners with the burning, it was held that the prisoners could not be convicted of an assault, for, although an assault was proved, there was no evidence to show that it conduced to the death. (q)

(n) *Reg. v. McEvoy*, 20 U. C. Q. B. 344.

(o) *Reg. v. Dingman*, 22 U. C. Q. B. 283; *Reg. v. Bird*, 2 Den. C. C. 94.

(p) *Reg. v. Cregan*, 1 Hannay, 36; and see *Reg. v. Ryan*, *ibid.* 119, per *Ritchie*, C. J.

(q) *Reg. v. Ganes*, 22 U. C. C. P. 185; following *Reg. v. Bird*, 2 Den. C. C. 94; *Reg. v. Dingman*, 22 U. C. Q. B. 283.

It was held, under the Con. Stats. Can., c. 99, s. 66, that there could be no conviction for an assault, unless the indictment charged an assault in terms, or a felony necessarily implying an assault; (r) and it has been doubted how far the section under consideration, by providing that there may be a conviction for assault, "although an assault be not charged in terms," alters the law in this respect.

It would seem that in the cases of rape, robbery, stabbing and the like, being all crimes which necessarily include an assault, a prisoner, if acquitted of the felony, can clearly be convicted of an assault, under this section, if the assault was included in and conduced to the felony; and as the charge of either of these offences necessarily includes a charge of assault, he could be so convicted even before the recent Act, without any charge of assault in terms. And one would naturally be led to think that on indictments for murder and manslaughter, though the bare charge of these offences does not show an assault, the prisoner might be convicted of an assault under the Act though not charged in terms, if the evidence showed an assault committed, in attempting to commit the felony charged, or as parcel thereof. But it has been held in several cases that on an indictment for murder in the statutory form, not charging an assault, the prisoner cannot be convicted of an assault; (s) so that if the principle of these decisions be adopted, the section has practically no operation.

A case cannot be brought within this Act, by averring an assault in the indictment which is not included in, and parcel of, the felony charged. There can be no conviction of an assault, unconnected with the felony charged. The Act only dispenses with an express allegation of an assault, where the felony is of such a nature, that the mere charge of it is also a charge of an assault. (t)

(r) *Reg. v. Dingman*, *supra*.

(s) *Reg. v. Smith*, 34 U. C. Q. B. 552; *Reg. v. Mulholland*, 4 Pugsley & B. 512.

(t) See *Reg. v. Dingman*, 22 U. C. Q. B. 283; *Reg. v. Bird*, 2 Den. C. C. 94; *Reg. v. Lackey*, 1 Pugsley & B. 194.

Shooting with intent to murder involves an assault. (u) An indictment charging the prisoner with having maliciously assaulted J. M. and cut him with a knife, with intent to do him grievous bodily harm, concluding *contra formam statuti*, was held bad, for the means used were not set out with such particularity, as necessarily to manifest the design, which constituted the felony, and there was no allegation following the words of the Act; and it was also held that the conviction could not stand for an assault, as the Act does not operate to supply defects in indictments. (v)

Upon an indictment containing counts for assaulting and maliciously inflicting grievous bodily harm, and a count for a common assault, after evidence of grievous injuries inflicted by the prisoner, the judge told the jury that there was evidence to go to them of grievous bodily harm, and that the question of whether the prisoner intended to inflict grievous bodily harm consequently did not arise. The jury found the prisoner guilty of an aggravated assault, without premeditation, under the influence of passion; and it was held that the assault was intentional in the understanding of the law; that upon the facts, the jury were justified in finding the defendant guilty of an assault with grievous bodily harm, and that the prisoner was properly convicted of that offence. (w)

An indictment charging a prisoner with shooting at A. B., with intent to do him grievous bodily harm, is well supported by evidence, showing that he fired a loaded pistol indiscriminately into a group, intending to do grievous bodily harm, and that he hit A. B. (x)

In construing the latter part of the 32 & 33 Vic., c. 20, s. 19, we should read the section as though the term "malicious" had been introduced. It is an essential element in a conviction, under this section, that the act which caused

(u) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 296, per *Draper*, C. J.

(v) *Reg. v. Magee*, 2 Allen, 14.

(w) *Reg. v. Sparrow*, 8 U. C. L. J. 55; Bell, 298; 30 L. J. (M. C.) 43.

(x) *Reg. v. Fretwell*, 33 L. J. (M. C.) 128; L. & C. 443.

(y) *Reg. v. Ward*, L. R. 1 C. C. R. 356.

the unlawful wounding should have been done maliciously as well as unlawfully. (y)

Thus the prosecutor and the prisoner were out at night, in separate punts on a creek, in pursuit of wild fowl. The prisoner, who was jealous of any one going there to shoot, and had threatened to fire at birds, notwithstanding other persons might be between him and them, discharged his gun from a distance of twenty-five yards towards the punt, in which the prosecutor lay paddling. At that moment the prosecutor's punt slewed round, and the prosecutor was struck by some of the shot and seriously wounded, whereupon the prisoner rendered him help, assuring him that the injury was an accidental result of the slewing round of the punt. The night was light, and the boat visible fifty yards off. No birds were in view. The two men had always been on good terms, and the gun was fired, apparently, with the intention of frightening the prosecutor away rather than that of hurting him. The prisoner was indicted for the felony of wounding, with intent to do grievous bodily harm, but was found guilty of the misdemeanor of unlawfully wounding, within the above section; and it was held that there was proof of malice which justified the conviction of the prisoner. (z)

The Con. Stats. Can., c. 91, s. 37, applied only to common assaults. (a)

No words of provocation whatever can amount to an assault. (b) To constitute such an assault as will justify moderate and reasonable violence in self-defence, there must be an attempt or offer with force and violence to do a corporal hurt to another, as by striking him with or without a weapon, or presenting a gun at him, at such a distance to which the gun will carry, or pointing a pitchfork at him, standing within reach of it, or by holding up one's fist at

(z) *Reg. v. Ward* L. R. 1 C. C. R. 356.

(a) *Re McKinnon*, 2 U. C. L. J. N. S. 328, per A. Wilson, J.

(b) *The Toronto S. V. A. R.* 170.

him, or by drawing a sword, and waving it in a menacing manner. (c)

Where therefore some thirty persons, armed and riotously assembled in front of the plaintiff's house, and apparently in the act of breaking into it, threatened to break into it, and assault, tar, feather and ride the plaintiff on a rail, it was held that though the plaintiff believed they were going to break into his house for this purpose, yet he could not justify shooting at them with a pistol, without warning them to desist and depart, but such request to depart would not have been necessary, perhaps, if the aggressors had been actually advancing upon the plaintiff in the attitude of assaulting him, and still less if any of them had actually struck him. (d)

The law is properly careful to exact that people shall not on the mere apprehension of violence, which is not immediately threatened, resort to desperate means of defence and shed blood without necessity, though there may be considerable provocation and some show of violence, and, generally speaking, it must be left to the jury to ascertain as a question of fact whether the means of resistance adopted were justified by the nature of the attack. (e) If more force and violence be used than necessary to expel a party from a house, after he has been requested, and refused to leave, it cannot be justified. (f) Although a party may lawfully take hold of one who declines to leave his house and put him out, yet he has no right to beat him cruelly, not in order to make him go out, but to punish him for not having done so. (g)

But there is a manifest distinction between endeavoring to turn a person out of a house into which he has entered quietly, and resisting a forcible attempt to enter; in the

(c) *The Toronto S. V. A. R.* 178-9.

(d) *Spires v. Barrick*, 14 U. C. Q. B. 424, per *Robinson*, C. J.

(e) *Ibid.* 424, per *Robinson*, C. J.

(f) See *Glass v. O'Grady*, 17 U. C. C. P. 233.

(g) *Ibid.* 236, per *J. Wilson*, J.; *Davis v. Lennon*, 8 U. C. Q. B. 599.

former case a request to depart is necessary, in the latter not. (*h*)

Upon an indictment for assaulting a bailiff of a county court, in the execution of his duty, the production of a county court warrant for the apprehension of the prisoner is sufficient justification of the act of the bailiff, in apprehending the prisoner, without proof of the previous proceedings authorizing the warrant. (*i*)

Moderate correction of a servant or scholar, by his master, is not an assault. But a master has not by law a right to use force in the correction of any servant, but an apprentice. The moderate correction of a servant, who is an infant, may be justified, but the beating of a servant of full age cannot, and will form a sufficient cause or excuse for departure, or for discharge from service by a master, on complaint. Wounding, kicking and tearing a person's clothes do not fall within the scope of moderate correction. (*j*) School-masters have a right of moderate chastisement against disobedient and refractory scholars; but it is a right which can only be exercised when necessary for the maintenance of school discipline and the interests of education, and to a degree proportioned to the nature of the offence committed. Any chastisement exceeding this limit, and springing from motives of caprice, anger or bad temper, constitutes an offence punishable like ordinary delicts. (*k*)

On an indictment charging an aggravated assault, or an offence of a higher nature than an assault, but nevertheless including it, the prisoner may be found guilty of a common assault, for it is not necessary that matter of aggravation stated in the indictment should be proved, and, if not proved, the prisoner may be found guilty of the offence without the circumstances of aggravation. (*l*) Thus a person, in-

(*h*) *Reg. v. O'Neill*, 3 Pugsley & B. 49.

(*i*) *Reg. v. Davis*, 8 U. C. L. J. 140; L. & C. 64; 30 L. J. (M. C.) 159.

(*j*) *Mitchell v. Defries*, 2 U. C. Q. B. 430, per *McLean*, J.

(*k*) *Brisson v. Lafontaine*, 8 L. C. J. 173.

(*l*) *Reg. v. Taylor*, L. R. 1 C. C. R. 194; 38 L. J. (M. C.) 106.

dicted for inflicting grievous bodily harm and actual bodily harm, may be convicted of a common assault; (m) and a charge of assault and beating would be sustained by proof of an aggravated assault, as the aggravation is merely matter of evidence. (n)

This offence is a misdemeanor (o) and is so punishable. The punishment usually inflicted is fine, imprisonment and sureties to keep the peace. (p) The Court of Quarter Sessions has a general power to fine and imprison in case of assault. (q)

A charge of assaulting a bailiff in the execution of his duty, being a misdemeanor, is triable at the sessions. (r)

An assault may, in certain cases, amount to a capital felony, when, it is apprehended, it could not be tried at the sessions. An assault may be accompanied by violence from which death ensues, and then the offence would be either murder or manslaughter. Or an assault may be accompanied with a violation of the person of a woman against her will, in which case it would be a rape, or though the purpose was not effected, the circumstances might be such as to leave no doubt of an assault with intent to commit a rape, therefore an assault may amount to a capital felony, or a felony, or a misdemeanor, according to the circumstances with which it is accompanied. (s)

Kidnapping.—This offence is regulated by the 32 & 33 Vic., c. 20, s. 69. The intent referred to in that section refers to the seizure and confinement in Canada, as well as to kidnapping, and an indictment therefore charging such seizure and confinement, without averring any intent, is defective. (t)

(m) *Reg. v. Oliver*, 8 U. C. L. J. 55; Bell, 287; 30 L. J. (M. C.) 12; *Reg. v. Yeadon*, L. & C. 81; 31 L. J. (M. C.) 70.

(n) *Re McKinnon*, 2 U. C. L. J. N. S. 329, per A. Wilson, J.

(o) See *Reg. v. Taylor*, L. R. 1 C. C. R. 194.

(p) *Ovens v. Taylor*, 19 U. C. C. P. 52, per Hagarty, J.; *Reg. v. O'Leary*, 3 Pugsley, 264.

(q) *Ovens v. Taylor*, *supra*, 49.

(r) *Reg. v. Caisse*, 8 L. C. J. 281.

(s) *McCurdy v. Swift*, 17 U. C. C. P. 139, per A. Wilson, J.

(t) *Cornwall v. Reg.* U. C. Q. B. 106.

CHAPTER V.

OFFENCES AGAINST PROPERTY.

Burglary.—Burglary has been defined to be a breaking and entering the mansion house of another in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not. (a)

Both a breaking and entering are necessary to complete the offence, and every entrance into the house, in the nature of a mere trespass, is not sufficient. Thus if a man enter a house by a door or window which he finds open, or through a hole which was made there before, and steal goods, or draw goods out of the house through such door, window, or hole, he will not be guilty of burglary. (b) There must either be an actual breaking of some part of the house, in effecting which more or less actual force is employed, or a breaking by construction of law, where an entrance is obtained by threats, fraud, or conspiracy. (c)

An actual breaking of the house may be by making a hole in the wall; by forcing open the door; by putting back, picking or opening the lock with a false key; by breaking the window; by taking a pane of glass out of the window, either by taking out the nails or other fastening, or by drawing or bending them back, or by putting back the leaf of a window with an instrument, and even the drawing or lifting of a latch. (d)

Where the door is not otherwise fastened, the turning of the key where the door is locked on the inside, or the unloosing

(a) Russ. Cr. 1.

(b) *Ibid.* 2.

(c) *Ibid.*

(d) 2 Russ. Cr. 2-3; *Rex v. Owen*, 1 Lewin, 35, per Bayley, J.; *Rex v. Lawrence*, 4 C. & P. 231; *Rex v. Jordan*, 7 C. & P. 432.

Every house for the dwelling and habitation of man is taken to be a dwelling-house in which burglary may be committed; (u) and this dwelling-house formerly included the outhouses, such as warehouses, barns, stables, cow-houses, or dairy-houses, though not under the same roof or joining contiguous to the dwelling-house, provided they were parcel thereof. But now the 32 & 33 Vic., c. 21, s. 52, enacts that such houses shall not be considered part of the dwelling-house for the purpose of burglary, unless there be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from one to the other. (v)

Unless the owner has taken possession of the house by inhabiting it personally or by some one of his family, it will not have become his dwelling-house as applied to the offence of burglary. (w) But the occasional or temporary absence of the owner will not prevent it from being his dwelling-house. (x) However, in these cases there must be an intention, on the part of the owner, to return to his house, *animus revertendi*. (y)

As to the time of committing the offence, it is settled that in the daytime there can be no burglary. (z) If a house is entered in the daytime it is house-breaking and not burglary. By the 32 & 33 Vic., c. 21, s. 1, it is enacted that so far as regards the offence of burglary the night shall be considered to commence at nine o'clock in the evening of each day, and end at six o'clock in the morning of the next succeeding day.

The breaking and entering need not be both in the same night, provided the breaking be with the intent to enter,

(u) 2 Russ. Cr. 15.

(v) See *Reg. v. Burrowes*, 1 Mood. C. C. 274; *Reg. v. Higgs*, 2 C. & K. 322; *Reg. v. Jenkins*, R. & R. 224.

(w) 2 Russ. Cr. 21.

(x) *Ibid.* 23.

(y) *Ibid.* 4 Bla. Com. 225.

(z) 4 Bla. Com. 224.

and the entry with the intent to commit a felony. (a) But the breaking and entry must both be committed in the night-time. If the breaking be in the day and the entry in the night, or the breaking in the night and the entering in the day, it is no burglary. (b)

As to the intent, the offence must be with intent to commit some felony within the house, whether such felonious intent be executed or not ; (c) and when the breaking is a breaking out of the dwelling-house in the night there must have been a previous entry with intent to commit a felony, or an actual committing of a felony in such dwelling-house. (d)

If the entry were only for the purpose of committing a trespass, the offence will not be burglary. But if a felony be committed, the act will be *prima facie* pregnant evidence of an intent to commit it. (e) And it is a general rule that a man who commits one sort of felony, in attempting to commit another, cannot excuse himself on the ground that he did not intend the commission of that particular offence. (f) But it makes no difference whether the offence intended were felony at common law, or only created so by statute, on the ground that, when a statute makes an offence felony, it incidently gives it all the properties of felony at common law. (g)

The offence of house-breaking is very nearly allied to that of burglary, the principal distinctions between them being that the latter is committed by night, the former by day ; and by the express language of the statute, the breaking and entering, in case of the former, must be accompanied with some larceny, and an intent to commit a felony is not sufficient.

(a) *Reg. v. Smith*, R. & R. 417 ; see *Reg. v. Jordan*, 7 C. & P. 432 ; Arch. Cr. Pldg. 490.

(b) *Reg. v. Smith*, *supra*.

(c) *Ante* p. 225.

(d) *Ante* p. 227.

(e) See *Reg. v. Locost*, Kel. 30.

(f) 2 Russ. Cr. 41.

(g) *Ibid.* 43.

A man cannot be indicted for a burglary in his own house. Therefore, if the owner of a house break and enter the room of his lodger, and steal his goods, he can only be convicted of larceny. (*h*)

The 32 & 33 Vic., c. 21, s. 54, makes it felony to break and enter any building, and commit any felony therein, such building being within the curtilage of a dwelling-house, and occupied therewith, though such building is not part thereof, according to the law of burglary. It is also felony for any one, being in any such building, to commit any felony therein, and break out of the same. Sec. 56 makes it felony to break and enter any dwelling-house, church, chapel, meeting-house, or other place of divine worship, or any building within the curtilage, school-house, shop, warehouse or counting-house, with intent to commit any felony therein; and sec. 57 provides that whosoever is indicted for any burglary, where the breaking and entering are proved at the trial to have been made in the daytime, and no breaking out appears to have been made in the night-time, or where it is left doubtful whether such breaking and entering, or breaking out, took place in the day or night-time, shall be acquitted of the burglary, but may be convicted of the offence specified in the next preceding section. By sec. 58, it shall not be available, by way of defence, for a person charged with the offence specified in the next preceding section but one, to show that the breaking and entering were such as to amount in law to burglary, provided that the offender shall not be afterwards prosecuted for burglary upon the same facts; but it shall be open to the court, before whom the trial for such offence takes place, upon the application of the person conducting the prosecution, to allow an acquittal, on the ground that the offence, as proved, amounts to burglary; and if an acquittal takes place on such ground, and is so returned by the jury in delivering their verdict, the same shall be recorded, to-

(*h*) Arch. Cr. Pldg. 496.

gether with the verdict, and such acquittal shall not then avail as a bar or defence upon an indictment for such burglary.

Robbery.—This offence consists in the felonious taking of money or goods, of any value, from the person of another, or in his presence, against his will, by violence, or putting him in fear of purpose to steal the same. (i)

Robbery is, in effect, larceny, aggravated by circumstances of force, violence, or putting in fear; and a party indicted for robbery may be convicted of larceny, as the latter crime is included in the former. (j) Force is a necessary ingredient in robbery, but not in larceny. (k)

Merely snatching property from a person unawares, and running away with it, will not be robbery, (l) because fear cannot, in fact, be presumed in such a case. The rule appears to be well established that no such sudden taking or snatching is sufficient to constitute robbery, unless some injury be done to the person, or there be a previous struggle for the possession of the property, or some force used to obtain it. (m)

The fear must precede the taking, for if a man privately steal money from the person of another, and afterwards keep it, by putting him in fear, this is no robbery, for the fear is subsequent to the taking. (n)

The goods must be of some value to the party robbed; and therefore, where the defendant compelled the prosecutor, by threats, to sign a promissory note for a sum of money, it was holden by the judges not to be robbery, because the note was of no value to the prosecutor, who had not even a property in or possession of the paper on which it was written. (o) Under such circumstances, however, the defendant might now be indicted for the felony described in the 32 & 33 Vic., c. 21, s. 47.

(i) *Re Burley*, 1 U. C. L. J. N. S. 50, per *J. Wilson*, J.

(j) *Reg. v. McGrath*, L. R. 1 C. C. R. 210-11, per *Blackburn*, J.

(k) *Ibid.*

(l) *Reg. v. Baker*, 1 Leach, 290; *Reg. v. Walls*, 2 C. & K. 214.

(m) Arch. Cr. Pldg. 413-14.

(n) *Ibid.* 416.

(o) *Ibid.*; *Reg. v. Smith*, 2 Den. 449; 21 L. J. (M. C.) 111.

The goods must be taken either from the person of the prosecutor, or in his presence, (*p*) and against his will. If the party robbed consent to the robbery, the offence will not be made out; but it is sufficient to prove that the goods were either taken from him by force and violence, or delivered up by him to the defendant, under the impression of that degree of fear and apprehension which is necessary to constitute robbery. (*q*)

The goods must appear to have been taken *animo furandi*, as in other cases of larceny; and if a person, under a *bona fide* impression that the property is his own, obtain it by menace, that is a trespass, but not robbery. (*r*)

An actual taking, either by force, or upon delivery, is necessary—that is, it must appear that the robber actually got possession of the goods. The goods must also be carried away, as in other cases of larceny; but if the property be once taken, the offence will not be purged by the robbers delivering it back to the owner. (*s*)

Upon an indictment for robbery, or for an assault with intent to rob, in different counts, it has been held that the prosecutor ought to elect upon which count he would proceed. (*t*) But now, on the trial of an indictment for robbery, the jury may convict of an assault with intent to rob, (*u*) so that the necessity of several counts in such case is obviated. (*v*)

The proviso in s. 17 of the 32 & 33 Vic., c. 21, was intended to meet a difficulty which arose in *Reg. v. Skeen*. (*w*)

Larceny.—Theft is wrongfully obtaining possession of any movable thing which is the property of some other person, and of some value, with the fraudulent intent entirely to deprive him of such thing, and have or deal

(*p*) See *Reg. v. Francis*, 2 Str. 1015; *Reg. v. Hamilton*, 8 C. & P. 49.

(*q*) Arch. Cr. Pldg. 416-17.

(*r*) *Ibid.*; *Reg. v. Hall*, 3 C. & P. 409.

(*s*) Arch. Cr. Pld. 417.

(*t*) *Reg. v. Gough*, 1 M. & Rob. 71.

(*u*) 32 & 33 Vic., c. 21, s. 40.

(*v*) Arch. Cr. Pldg. 70.

(*w*) Bell, 97; 28 L. J. (M. C.) 91.

with it as the property of some person other than the owner. (x) Larceny has been also defined as the wrongful or fraudulent taking, and carrying away, by any person, of the mere personal goods of another, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner. (y)

The goods taken must, in the absence of any express statutory enactment, be personal goods, for none other can be the subject of larceny at common law. (z) Bonds, bills, etc., being mere *choses* in action, are not the subject of larceny at common law, for they are of no intrinsic value. (a) But the 32 & 33 Vic., c. 21, s. 15, and following sections, now render the stealing, destroying, cancelling, obliterating, or concealing of any valuable security, or of any deed relating to land, or any record of any court of justice, or other legal documents, felony.

The police court of Toronto is a court of justice within the meaning of these sections. (b)

The indictment under these sections must particularize the kind of valuable security stolen. (c)

When a note, which had been by mistake made out in favor of the defendant, and on discovery of the error returned by him unstamped and unendorsed, and afterwards stolen by him, and by him stamped and endorsed, it was held not a valuable security. (d)

A party cannot commit larceny of a bond made by another person to himself, and, especially, he could not be guilty of larceny in stealing a bond from the obligor because a bond in the hands of the obligor could be of no value to him, as a bond, under any possible circumstances;

(x) Cr. Law Comrs. 3rd Rep.

(y) *Reg. v. McGrath*, L. R. 1 C. C. R. 209, per *Kelly*, C. B.; 39 L. J. (M. C.) 7.

(z) Arch. Cr. Pldg. 316.

(a) *Ibid.* 317.

(b) *Reg. v. Mason*, 22 U. C. C. P. 246.

(c) *Reg. v. Lowrie*, L. R. 1 C. C. R. 61; 36 L. J. (M. C.) 24.

(d) *Scott v. Reg.*, 2 S. R. C. 349.

and when the 2 Geo. II., c. 25, was in force, no other than a bond for the payment of money could be the subject of larceny. (e)

Certificates treated and dealt with on the London Stock Exchange, as scrip of a foreign railway, are "valuable security" within the 7 & 8 Geo. IV., c. 29, s. 5, and the subject of larceny. (f)

On an indictment for stealing a piece of paper, the defendant could not be convicted of stealing an agreement, though unstamped, for building certain cottages, the work under which agreement was actually in progress. (g)

Larceny cannot be committed of things which are not the subject of property. (h) But partridges hatched and reared by a common hen, while they remain with her, and from their inability to escape, are practically under the dominion and in the power of the owner of the hen, may be the subject of larceny, though the hen is not confined in a coop, or otherwise, but allowed to wander with her brood about the premises of her owner. (i)

Dogs not being the subject of larceny at common law, are not chattels within 7 & 8 Geo. IV., c. 29, s. 53, (j)

There is no absolute property in animals *feræ naturæ*, but only a special or qualified right of property—a right *rationi soli* to take and kill them; and when killed upon the soil, they become the absolute property of the owner of the soil.

When the thing is not, in its original state, the subject of larceny, it is necessary that the act of taking should not be one continuous act with the act of severance, or other act, by which the thing becomes the subject of larceny. (k)

(e) *Caverley v. Caverley*, 3 U. C. Q. B. O. S. 341, per *Robinson*, C. J.

(f) *Reg. v. Smith*, 2 U. C. L. J. 59; *Dears. C. C.* 581.

(g) *Reg. v. Watts*, *Dears.* 328; 23 L. J. (M. C.) 56; see now 32 & 33 Vic. c. 21, s. 15.

(h) *Arch. Cr. Pldg.* 318.

(i) *Reg. v. Shickle*, L. R. 1 C. C. R. 158; 38 L. J. (M. C.) 21; *Reg. v. Cory*, 10 Cox, 23, followed.

(j) *Reg. v. Robinson*, 5 U. C. L. J. 143; *Bell*, 34; 28 L. J. (M. C.) 58.

(k) *Reg. v. Townley*, L. R. 1 C. C. R. 317, per *Bovill*, C. J.

Thus where poachers, of whom the prisoner was one, wrongfully killed a number of rabbits upon land belonging to the Crown, and placed the rabbits in a ditch upon the same land, some of the rabbits in bags and some strapped together; having no intention of abandoning the wrongful possession of the rabbits which they had acquired by taking them, but placing them in the ditch as a place of deposit till they could conveniently remove them, which they did about three hours afterwards; it was held that the taking of the rabbits and the removal of them was one continuous act, and that the removal was therefore not larceny. (l)

But if the goods vest in the owner, in the interval between the severance and the removal, it is larceny. (m) Potatoes severed from the soil, or dug and in pits, are clearly the subject of larceny. (n)

The distinction between grand and petty larceny has been abolished, and now all larcenies, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the distinction between grand and petty larceny was abolished. (o)

There must be an actual or constructive taking of the goods, on the ground that larceny includes a trespass. (p) There must also be a carrying away; but, as the felony lies in the very first act of removing the property, the least removing of the thing taken from the place where it was before, with intent to steal it, is a sufficient asportation. (q)

There must also be an *animus furandi*: i. e., a felonious intent to take the property of another against his will. The essence of the offence is knowingly taking the goods of another against his will. (r) If the goods were taken with the consent

(l) *Reg. v. Townley*, L. R. 1 C. C. R. 315.

(m) *Ibid.* 318, per *Bramwell*, B.

(n) *Hunter v. Hunter*, 25 U. C. Q. B. 146, per *Hagarty*, J.

(o) 32 & 33 Vic., c. 21, s. 2.

(p) 2 Russ. Cr. 152.

(q) *Ibid.*; see also *Reg. v. Townley*, L. R. 1 C. C. R. 319, per *Blackburn*, J.

(r) *Reg. v. McGrath*, L. R. 1 C. C. R. 210-11, per *Blackburn*, J.; see *Reg. v. Prince*, L. R. 1 C. C. R. 150; 38 L. J. (M. C.) 8.

of the owner then the property would pass, and according to a distinction to be afterwards pointed out, it would not be larceny. If not taken feloniously, the taking would amount only to a bare trespass.

Thus, where the prisoner's goods were seized under warrants of execution of a county court, and were in possession of a bailiff, and the prisoner, with intent to deprive the bailiff, as he supposed, of his authority, and so defeat the execution, forcibly took the warrants from him, without any intent otherwise to make use of them, it was held that the prisoner was not guilty of larceny. (s) But in such case the prisoner might be guilty of taking the warrants for a fraudulent purpose, within the meaning of the 32 & 33 Vic., c. 21, s. 18, by which the stealing of any records is made felony. (t)

Returning the goods may be evidence to negative the *animus furandi* at the time of taking them, but it is no evidence that the prisoner intended to return them when taken. (u)

As to larceny of lost property, the general rule seems to be that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny ; but if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. (v) It is necessary that the prisoner, at the time of finding, should believe that the owner can be ascertained, and without this, an intention to appropriate, at the time of the finding, will not make the

(s) *Reg. v. Bailey*, L. R. 1 C. C. R. 347.

(t) *Ibid.*

(u) *Reg. v. Cummings*, 4 U. C. L. J. 189, per *Spragge*, V. C.; *Reg. v. Trebilcock*, 4 U. C. L. J. 168; *Dears. & B.* 453; 27 L. J. (M. C.) 103.

(v) *Reg. v. Thurborn*, 1 Den. 388; 2 C. & K. 831; 18 L. J. (M. C.) 140; affirmed in *Reg. v. Glyde*, L. R. 1 C. C. R. 139; 37 L. J. (M. C.) 107.

prisoner guilty of larceny, though he ascertained the name of the owner before converting to his own use *w*)

In these cases the first consideration is the prisoner's ground for believing that the goods were abandoned. (*x*)

There is a distinction between property which is lost or abandoned, and that which is only mislaid. If property is abandoned, any one may acquire a right against the owner, (*y*) and, as above explained, a person may, in certain cases, acquire a lawful title to lost property, and cannot, therefore, be found guilty of larceny. But if property is only mislaid or left in some place of deposit or security, a person fraudulently appropriating it is guilty of larceny.

Thus where a purchaser at the prisoner's stall left his purse in it, and a stranger pointed out the purse to the prisoner, supposing it to be hers, and reproved her for carelessness, when she put it in her pocket, and afterwards concealed it, and on the return of the owner denied all knowledge of it. Upon an indictment for larceny, the jury found that the prisoner took up the purse, knowing that it was not her own, intending at the same time to appropriate it to her own use, but that when she took it she did not know who was the owner. She was held properly convicted, and that the purse so left was not lost property. (*z*)

Next, the prisoner must, at the time of finding, have the means of ascertaining who the owner is, or reasonably believe that he can be found.

Upon an indictment for stealing a note, it was found by the jury that the note was lost by the prosecutor and found by the prisoner. There was no evidence that the note had any name or other mark upon it indicating to whom it belonged, nor was there evidence of any other circumstances which would disclose to the prisoner, at the time when he found it, the means of discovering the owner. It was held

(*w*) *Reg. v. Glyde, supra.*

(*x*) *Ibid.* 144, per Cockburn, C. J.

(*y*) See *Reg. v. Glyde, supra.*

(*z*) *Reg. v. West*, 1 U. C. L. J. 17 ; *Deara*. 402 ; 24 L. J. (M. C.) 4.

that he could not be convicted of larceny, although the jury being asked whether, at or after the time of finding, he believed that there was not a reasonable probability that the owner could be found, had answered that he did believe the owner could be traced. (a)

Lastly, there must be evidence of a felonious intention to appropriate the property *at the time of finding*; and evidence of a subsequent intention is insufficient. (b)

Thus, where the prisoner, a depositor in a Post Office savings bank, in which 11s. stood to his credit, gave notice to withdraw 10s., and the clerk at the office of payment, by mistake referring to a letter of advice for £8 16s. 10d., laid the latter sum upon the counter, which the prisoner, *animo furandi*, took up and appropriated to his own use, it was held that he was guilty of larceny. (c)

But where a post letter, directed to J. D., containing a Post Office order, was misdelivered to J. D., one of the prisoners, who took it to W. D., the other prisoner, who read it to him. Upon hearing its contents, J. D. said that the letter and order were not for him, when W. D. advised him, notwithstanding, to keep the letter, and get the money. Both prisoners accordingly applied at the Post Office, and obtained the money. It was held that a conviction of the prisoners for stealing the order must be set aside, (d) as there was no *animus furandi* at the time of taking.

It has been already stated that every larceny involves a trespass, and that the taking must be *animo furandi* and *invito domini*. If the possession of the goods is lawfully obtained, there can be no larceny, nor can there be any larceny if the property in the goods is divested. The property in goods can only pass by a contract, which requires the assent of two minds; but it is of the essence of the offence of larceny that the property be obtained against

(a) *Reg. v. Dixon*, 2 U. C. L. J. 19; Dears. 580; 25 L. J. (M. C.) 39.

(b) *Reg. v. Christopher*, 5 U. C. L. J. 143; Bell, 27; 28 L. J. (M. C.) 35.

(c) *Reg. v. Middleton*, L. R. 2 C. C. R. 38; see also *Reg. v. Ewing*, 21 U. C. C. P. 523.

(d) *Reg. v. Davies*, 2 U. C. L. J. 137; Dears. 640; 25 L. J. (M. C.) 91.

the will of the owner. If, therefore, the owner intends to part with the property, by virtue of which intention the property would pass, there can be no larceny, however fraudulent the means by which the property is obtained.

Or the law may be stated thus: When the prosecutor does not intend to part with the right of property in the goods or money taken by the defendant, or, in some cases, does not intend to part with the possession of them until they are paid for, and the defendant fraudulently gets possession of them, contrary to the intention of the owner, intending all the time not to pay for them, then the jury may find the party guilty of larceny. But where the owner voluntarily parts with the possession *and property* of the goods, and intends to vest them in the defendant, because he relies upon the defendant's promise to pay the money, or bring other property or money in place of those vested in him, then the prisoner cannot be convicted of larceny. (e)

Where a servant is intrusted with his master's property, with a general or absolute authority to act for his master in his business, and is induced, by fraud, to part with his master's property, the person who is guilty of the fraud, and so obtains the property, is guilty of obtaining it by false pretences, and not of larceny, because, to constitute larceny, there must be a taking against the will of the owner, or of the owner's servant, duly authorized to act generally for the owner. But where a servant has no such general or absolute authority from his master, but is merely entrusted with the possession of his goods for a special or limited purpose, and is tricked out of that possession by fraud, the person who is guilty of the fraud, and so obtains the property, is guilty of larceny, because the servant has no authority to part with the property in the goods, except to fulfil the special purpose for which they were entrusted to him. (f)

(e) *Reg. v. Bertles*, 13 U. C. C. P. 610, per *Richards*, C. J.

(f) *Reg. v. Prince*, L. R. 1 C. C. R. 150; 38 L. J. (M. C.) 8.

The cashier of a bank is a servant having such general authority ; and if he is deceived by a forged order, and parts with the money of the bank, he parts intending to do so with the property in the money ; and the person knowingly presenting such forged order is guilty of obtaining the money by false pretences, and not of larceny. (g)

The 32 & 33 Vic., c. 21, s. 93, has amended the law on this point. The subtle distinction between these offences, which this Act intended to remedy, was, that if a person, by fraud, induced another to part with the *possession only* of his goods, it was larceny : while, if with the *property as well as* the possession, it was not. (h)

The following case will serve to make clearer the distinction :—

The prisoner, with another man, went into the shop of the prosecutrix, and asked for a pennyworth of sweetmeats, for which he put down a florin. The prosecutrix put it into the money drawer, and put down 1s. 6d. in silver and five-pence in copper, in change, which the prisoner took up. The other man said, " You need not have changed," and threw down a penny, which the prisoner took up, and the latter then put down a sixpence in silver and sixpence in copper on the counter, saying " Here, mistress, give me a shilling for this." The prosecutrix took a shilling out of the money drawer, and put it on the counter, when the prisoner said to her, " You may as well give me the two-shilling piece, and take it all." The prosecutrix took from the money drawer the florin she had received from the prisoner, and put that on the counter, expecting she was to receive two shillings of the prisoner's money in exchange for it. The prisoner took up the florin, and the prosecutrix the silver sixpence and the sixpence in copper, put down by the prisoner, and also the shilling put down by herself, and was putting them into the money drawer, when she said she had

(g) *Reg. v. Prince, supra.*

(h) *Reg. v. Kilham*, L. R. 1 C. C. R. 263, per Bovill, C. J.

only got one shilling's worth of the prisoner's money: but at that moment the prisoner's companion drew away her attention, and, before she could speak, the prisoner pushed his companion by the shoulder, and both went out of the shop. It was held that the transaction was not complete, and that the property in the florin had not passed to or revested in the prisoner, and, on that ground, he was rightly convicted of larceny. (i)

A. acted as auctioneer at a mock auction. He knocked down some cloth for 26s. to B., who had not bid for it, as A. knew. B. refused to take the cloth, or to pay for it, and A. refused to allow her to leave the room unless she paid. Ultimately, she paid the 26s. to A. and took the cloth. She paid the 26s. because she was afraid. A. was indicted for, and convicted of feloniously stealing the 26s. It was held that the conviction was right, because, if the force used to B. made the taking a robbery, all the elements of larceny were included in that crime; and if not sufficient to constitute a robbery, the taking of the money, nevertheless, amounted to larceny, as B. paid the money to A. against her will, and because she was afraid. (j)

A. & B., by false representations, induced C. to become the purchaser of a dress for 25s. They then took one guinea out of her hand, she being taken by surprise, and neither consenting nor resisting, and left with her a dress of considerably inferior value, but refused to give her one which they had promised to give, if she would buy that. Upon a case reserved, as to whether the facts warranted a verdict of guilty of larceny, it was held that they did; the court being bound to assume that it was part of the fraud to obtain the property by a false sale; and, if so, there was no contract, but a fraud, whereby the felony was committed. (k)

A quantity of wheat, not the property of the prosecutors,

(i) *Reg. v. McKale*, L. R. 1 C. C. R. 125; 37 L. J. (M. C.) 97.

(j) *Reg. v. McGrath*, L. R. 1 C. C. R. 205; 39 L. J. (M. C.) 7.

(k) *Reg. v. Morgan*, 1 U. C. L. J. 37; Dears. 395.

having been consigned to their care, was deposited in one of their storehouses, under the care of a servant, E., who had authority to deliver only to the orders of the prosecutors, or C., their managing clerk. The prisoner, a servant of the prosecutors, at another storehouse, by representation to E. that he had been sent by C. for some of the wheat and was to take it to the Brighton Railway, which representation was entirely false, obtained the key from E., and was allowed to remove five quarters, which he subsequently disposed of for his own use, the prisoner assisting to put the five quarters into the cart, in which it was conveyed away, and going with it. The prisoner was held guilty of larceny; for the wheat was delivered to him for a special purpose, namely, to be taken to the Brighton Railway, and the property remained in the prosecutors throughout, as bailees. (l)

But where the servants of a glovemaker broke open a store-room on their master's premises, and removed to another room, in the same premises, a quantity of finished gloves, with the intent of fraudulently obtaining payment for them, as for so many gloves finished by themselves, it was held that they were not guilty of larceny, because there was no intention to divest the property in the goods. (m)

Where a man having *animus furandi* obtains, in pursuance thereof, possession of the goods by some trick or artifice, the owner not intending to part with his entire right of property, but with the temporary possession only, this is considered such a taking as to constitute larceny. (n)

Thus it was the course of business at a colliery, where coal was sold by retail, to take the carts, when loaded, to a weighing machine in the colliery yard, where they were weighed, and the price of the coal was paid. The prisoner having gone to the colliery with a fraudulent intent, a servant of the prosecutor, upon the prisoner saying he wanted a load of the

(l) *Reg. v. Robins*, 1 U. C. L. J. 17; Dears. C. C. 418.

(m) *Reg. v. Poole*, 4 U. C. L. J. 73; 27 L. J. (M. C.) 53; Dears. & B. 345.

(n) Arch. Cr. Pldg. 333.

best soft coal, loaded prisoner's cart with soft coal, and went away, leaving him to take it to be weighed and pay for it. The prisoner then fraudulently covered over the soft coal with slack, an inferior coal, and by this trick, and by saying that the coal in the cart was slack, induced the weighing clerk, who did not know that the cart contained soft coal, to weigh it as slack, and charge the prisoner accordingly. It was held that the prisoner had obtained possession of the soft coal by a trick, and that he was properly convicted of larceny. (o)

A policeman, late at night, met the prosecutor, who had just parted from a prostitute, and told him that he must go with him (the policeman) to gaol, for he was under a penalty of £1 for talking to a prostitute in the street; but if he would give him 5s., he might go about his business. The prosecutor gave him 4s. 6d., but, while he was searching for the other 6d., the inspector came. It was held to be no answer to the charge, that all the money had not been obtained. The offence was a larceny, and was also a menace within the meaning of the Act. (p)

Where a porter was employed by the vendor of goods to deliver them to the vendee, but had no authority to receive the money for them; and the vendee, nevertheless, voluntarily, and without solicitation, paid the porter: it was held by a majority of the judges that a conviction for larceny was not sustainable, (q) as the possession of the money was lawfully obtained.

In the case of bailment or contract of hiring, it must have been made to appear that the *animus furandi* existed at the time of receiving the chattel, and was not induced by anything that happened afterwards. (r)

But by the 32 & 33 Vic., c. 21, s. 3, the law in this re-

(o) *Reg. v. Bramley*, 7 U. C. L. J. 331; L. & C. 21.

(p) *Reg. v. Robertson*, 11 L. T. Rep. N. S. 387; L. & C. 483; 34 L. J. (M. C.) 35; see also *Reg. v. Ewing*, 21 U. C. Q. B. 523, as to what constitutes larceny.

(q) *Reg. v. Wheeler*, 14 W. R. 848.

(r) *Pease v. McAloon*, 1 Kerr, 116, per Parker, J.

spect has been altered, and in cases of bailment a felonious intent, at the time of obtaining, is no longer necessary to constitute larceny.

Even before this statute, although the goods had, in the first instance, been obtained without a felonious intent, yet if the possession of them was obtained by a trespass, the subsequent fraudulent appropriation of them, during the continuance of the same transaction, was a larceny. (*s*)

A man cannot, however, be convicted of larceny as a bailee, unless the bailment was to redeliver the very same chattel or money. (*t*)

The prisoner, a carrier, was employed by the prosecutor to deliver in his (the prisoner's) cart a boat's cargo of coals to persons named in the list, to whom only he was authorized to deliver them. Having fraudulently sold some of the coals, and appropriated the proceeds, he was held to have been properly convicted of larceny as a bailee. (*u*)

And a prisoner who hired a pair of horses from a livery stable, to go to a particular place, and afterwards absconded with them, not intending at first to steal, but, having accomplished the object of hiring, made up his mind to convert them to his own use, was held properly convicted on an indictment for larceny, in the ordinary form. (*v*)

But the lessee of a pawn who sells it, is not guilty of larceny, under the above clause. (*w*)

A., the proprietor of a quantity of broom-corn, delivered it to B., under the agreement that when B. should have manufactured it into brooms, he should not sell them, but that A.'s clerk should sell them on A.'s account; that A. should deduct his advances from the proceeds of the sale of the

(*s*) See *Reg. v. Riley*, Dears. 149 ; 22 L. J. (M. C.) 48 ; Arch. Cr. Pldg. 340.

(*t*) *Reg. v. Hoare*, 1 F. & F. 647 ; *Reg. v. Garrett*, 2 F. & F. 14 ; *Reg. v. Hassell*, L. & C. 58 ; 30 L. J. (M. C.) 175.

(*u*) *Reg. v. Davies*, 14 W. R. 679 ; 10 Cox, 239.

(*v*) *Reg. v. Tweedy*, 23 U. C. Q. B. 120.

(*w*) *Gould v. Cowan*, 17 L. C. R. 46.

brooms, and B. should have the balance. B. supplied the smaller material requisite in working up the broom-corn into brooms. B. did not keep his agreement with A., but manufactured the brooms and converted them to his own use. It was held that A.'s delivery of the broom-corn to B. was a bailment to him, and that B.'s fraudulently converting it to his own use was larceny, in the terms of Con. Stats. Can., c. 92, s. 55. (x)

Money is property of which a person can be bailee, so as to make him guilty of felony if he appropriates it to his own use. (y)

And when a clerk, in performance of his duty, places money received by him in a safe, the property of his employers, his exclusive possession of that money ceases, even though the office containing the safe be his, and a subsequent appropriation of any of that money will amount to larceny. (z)

It seems that a married woman may be a bailee within 32 & 33 Vic., c. 21, s. 3. (a)

If the goods of the husband be taken with the consent or privity of the wife, it is not larceny; (b) and this even though she has been guilty of adultery. (c) Still, the fact of her being an adulteress might go to show a revocation of her authority to dispose of her husband's goods; and if others acted in concert with her in taking, that might amount to larceny on the part of those others. (d)

And where the prisoner was indicted for stealing certain chattels from his master, while in his employment, it was proved that he went off with his master's wife, *animo adulterii*, and knowingly took his master's property with him. On objection for the prisoner that he was acting under the control

(x) *Reg. v. Lebauf*, 9 L. C. J. 245.

(y) *Reg. v. Massey*, 13 U. C. C. P. 484.

(z) *Reg. v. Wright*, 4 U. C. L. J. 167; *Dears. & B.* 431; 27 L. J. (M. C.) 65; and see *Reg. v. Hennessy*, 35 U. C. Q. B. 603.

(a) *Reg. v. Robson*, L. & C. 93; 31 L. J. (M. C.) 22; *Arch. Cr. Pldg.* 341.

(b) *Reg. v. Harrison*, 1 *Leach*, 47; *Reg. v. Avery*, 5 U. C. L. J. 215; *Bell*, 150; 28 L. J. (M. C.) 185.

(c) *Reg. v. Kenny*, L. R. 2 Q. B. D. 307.

(d) *Ibid.*, per *Kelly*, C. B.

of its mistress, who could not be charged with stealing from her husband, and that, therefore, the charge could not be sustained, the court sustained the conviction. (e)

A servant and a bailee, at common law, are in a different position, for a bailee has the possession of the goods entrusted to him, a servant only the custody. (f) A servant, therefore, not having the lawful possession of his master's goods, might be guilty of larceny independently of the statute.

And where a servant, whose duty it was to pay his master's workmen, and, for this purpose, to obtain the necessary money from his master's cashier, fraudulently represented to the cashier that the wages due to one of the workmen were larger than they really were, and so obtained from him a larger sum than was, in fact, necessary to pay the workmen; intending at the time to appropriate the balance to his own use, which he afterwards did; it was held that, whether the obtaining the money in the first instance was larceny, or obtaining the money by false pretences, the money, while it remained in the prisoner's custody, was the property and in the possession of the master, the prisoner being the servant of the latter, and therefore the appropriation of it by the prisoner was larceny. (g)

The 32 & 33 Vic., c. 21, s. 38, enacts that "Whosoever, being a member of any copartnership, owning any money or other property, or being one of two or more beneficial owners of any money or other property, steals, embezzles, or unlawfully converts the same or any part thereof to his own use, or that of any person other than the owner, shall be liable to be dealt with, tried, convicted and punished as if he had not been or were not a member of such copartnership, or one of such beneficial owners."

This section has been held practically inoperative in the Province of Quebec, as a partner, having a right, both of

(e) *Re Mutters*, 13 W. R. 326; L. & C. 511; 34 L. J. (M. C.) 54.

(f) *Reg. v. Cooke*, L. R. 1 C. C. R. 300, per Bovill, C. J.

(g) *Ibid.* 295; but see *Reg. v. Thompson*, 32 L. J. (M. C.) 57; L. & C., 233.

possession and property, in the joint goods, the elements of larceny and its kindred offences are wanting. (*h*) This technical difficulty is precisely the evil which the section was intended to remedy, and according to Lord Coke's rule, is the consideration which should determine its construction.

Previously to the passing of this section, it was held in the same province, that a shareholder in an incorporated company could not commit larceny from the company, nor be guilty of obtaining its money by false pretences, on the ground that he was a joint owner of its funds and property. (*i*)

It would seem that a party cannot be convicted under the 32 & 33 Vic., c. 21, s. 26, for stealing fruit, "growing in a garden," unless the bough of the tree upon which the fruit was hanging was within the garden. It is not sufficient that the root of the tree is within the garden. (*j*)

The 32 & 33 Vic., c. 21, s. 25, applies only to trees attached to the freehold, not to trees made into cordwood. (*k*)

In estimating the amount of the injury, under section 21 of same statute, the injury done to two or more trees may be added together, provided the trees are damaged at one and the same time, or so nearly at the same time as to form one continuous transaction. (*l*)

Before the passing of the 32 & 33 Vic., c. 21, ss. 5 and 6, it was necessary that there should be a separate indictment for each act of larceny, or the prosecutor must have proved that the articles were all taken at the same time, or at several times so near to each other as to form parts of one continuing transaction, otherwise the court would have put the prosecutor to elect for which act of larceny he would proceed. (*m*) But by this statute, three different acts may now be proved on one indictment for larceny. The question, whether the several

(*h*) *Reg. v. Lowenbruck*, 18 L. C. J. 212.

(*i*) *Reg. v. St. Louis*, 10 L. C. R. 34.

(*j*) *McDonald v. Cameron*, 4 U. C. Q. B. 1; see 4 & 5 Vic., c. 25, s. 34.

(*k*) *Reg. v. Caswell*, 33 U. C. Q. B. 303.

(*l*) *Reg. v. Shepherd*, L. R. 1 C. C. R. 118; 37 L. J. (M. C.) 45.

(*m*) *Reg. v. Smith, Ry. & M.* 295; Arch. Cr. Pldg. 315.

acts are several takings or only one, is the same as before that statute. (n)

Before the section is applicable, it must be established that there were takings at different times, within the six months, which are to be calculated from the first to the last of such takings. (o)

Where gas was stolen by means of a pipe, which was joined to the main and always remained full, the gas being turned off only at the burners, it was held to be a continuous taking. (p)

The 32 & 33 Vic., c. 21, s. 112, provides for the punishment of persons bringing into or having in their possession in Canada, knowingly, any property stolen, embezzled, converted or obtained by fraud or false pretences, in any other country, in such manner that the stealing, etc., in like manner in Canada *would, by the laws of Canada*, be a felony or misdemeanor.

The Court of Queen's Bench had, at common law, no jurisdiction to issue a writ of restitution, except as part of the judgment on an appeal of larceny. The 21 Hy. VIII., c. 11, and 32 & 33 Vic., c. 21, s. 113, only confer this jurisdiction on the court before whom the felon has been convicted. (q)

Where the defence to a charge of larceny was that the goods were the prisoner's own, and the jury brought in a verdict of not guilty, it was held to be a virtual finding that the goods were not the property of the prosecutor, and, therefore, that the presiding judge could not order restitution. (r)

If, upon an indictment for stealing, as the servant of the prosecutor, money alleged to be his property, it appears from the evidence that the prisoner stole the money from him, but that he was not his servant, the allegation in the indictment

(n) *Reg. v. Firth*, L. R. 1 C. C. R. 175, per Bovill, C. J.

(o) *Ibid.*; *Reg. v. Bleasdale*, 2 C. & K. 765.

(p) *Reg. v. Firth*, L. R. 1 C. C. R. 172; 38 L. J. (M. C.) 54.

(q) *Reg. v. Lord Mayor of London*, L. R. 4 Q. B. 371.

(r) *Reg. v. Eveleth*, 5 All. 201.

that he was his servant may be rejected as surplusage, and the prisoner may be convicted of simple larceny. (s)

An indictment charging the prisoner with stealing bank notes "of the moneys, goods, and chattels of one J. B." sufficiently lays the property in the notes as the words, "moneys, goods, and chattels" may be rejected as surplusage and the indictment would then read "bank notes of one J. B." (t) As stealing bank notes is expressly made larceny, their legal character, as chattels, or otherwise, is not in question, because stealing them *eo nomine* is made felony. (u)

The prisoner was sent by his fellow-workmen to their common employer to get the wages due to all of them. He received the money in a lump sum, wrapped up in paper with the names of the workmen and the sum due to each written inside; it was held that he received the money as the agent of his fellow-workmen, and not as the servant of his employer, and as the money belonged to the workmen, it was wrongly described as the property of the employer. (v) A boy of fourteen years of age, living with, and assisting his father in his business without wages, at one o'clock in the day succeeded his father in the charge of his father's stall, whence some goods of the latter were stolen by the prisoner: it was held that, in a count for larceny, the ownership of the goods could not be laid in the boy; for he was not a bailee, but a servant. (w)

One C. was owner of an ox, and verbally gave it to his son, in whose name it was laid as being the owner in the indictment. There was no removal at the time of the gift, nor delivery, nor change of possession, nor writing; but the ox was in the son's possession at the time of the theft. On a case submitted for the opinion of the court, it was held that, to make a valid gift of personal property *inter vivos*, it

(s) *Reg. v. Jennings*, 4 U. C. L. J. 166; Dears. & B. 447.

(t) *Reg. v. Saunders*, 10 U. C. Q. B. 544; *Reg. v. Radley*, 2 C. & K. 974.

(u) *Reg. v. Saunders*, *supra*, 544, per Robinson, C. J.

(v) *Reg. v. Barnes*, L. R. 1 C. C. R. 45; 35 L. J. (M. C.) 204.

(w) *Reg. v. Green*, 3 U. C. L. J. 19; Dears. & B. 113; 28 L. J. (M. C.) 17.

is not necessary that there should be an actual delivery and change of possession. It is sufficient to complete such a gift, that the conduct of the parties should show that the ownership of the chattel has been changed, or that there has been an acceptance by the donee, and that therefore the property was well laid in the indictment. (x)

The prisoner was indicted for stealing the cattle of R. M. At the trial R. M. gave evidence that he was nineteen years of age; that his father was dead; that the goods were bought with the proceeds of his father's estate; that his mother was administratrix, and that the witness managed the property, and bought the cattle in question. On objection that the property in the cattle was wrongly laid, the indictment was amended by stating the goods to be the property of the mother. The case proceeded, and no further evidence of the administrative character of the mother was given; the county court judge holding the evidence of R. M. sufficient, and not leaving any question, as to the property, to the jury. On a case reserved, it was held that there was ample evidence of possession in R. M., to support the indictment, without amendment. (y) The conviction on the amended indictment was not sustainable, as the judge had apparently treated the case, as established by the fact of the cattle being the mother's property in her representative character, of which there was no evidence, nor was any question of ownership by her, apart from her representative character, left to the jury. (z)

Formerly, where goods stolen were the property of partners or joint owners, all the partners or joint owners must have been correctly named in the indictment, otherwise the defendants would have been acquitted. (a) But now the 32 & 33 Vic., c. 29, s. 17, provides that it shall be sufficient to name one of such persons, and to state the property to be-

(x) *Reg. v. Carter*, 13 U. C. C. P. 611.

(y) *Reg. v. Jackson*, 19 U. C. C. P. 280.

(z) *Ibid.*

(a) *Reg. v. Quinn*, 29 U. C. Q. B. 163, per *Richards*, C. J.

long to the person so named, and another or others as the case may be. The provisions of this statute must be strictly complied with. (b) Where an indictment under the old 23 Vic., c. 37, s. 1, charged defendant with procuring certain persons to cut trees, the property of A. B. & C., growing on certain land belonging to them, and the evidence showed that the land belonged to them and another or others as tenants in common; it was held that the conviction could not be supported. (c) An indictment for breaking into a church, and stealing vestments there, and describing the goods stolen as the property of "the parishioners of the said church," was held insufficient, and that they must be laid as the property of some person or persons individually. (cc) But having regard to the grounds of the decision in this case, and the language of the 32 & 33 Vic., c. 29, s. 19, it is apprehended that an indictment, in the above form, would now be sufficient.

S. and C., carmen of the Great Northern Railway Company, left the station in Middlesex, to proceed to Woolwich, in Kent, with one of the company's waggons, and, before starting, the usual oats, etc., for provender for the horses were given out to them and placed in the waggon in nosebags; at Woolwich, they took the nosebags from the waggon and delivered them to B., an ostler, for 6d. Upon an indictment at the Middlesex Sessions against S. and C. for stealing the oats, etc., and B. for receiving, they were found guilty. It was held that the case was within 7 Geo. IV., c. 64, s. 13; (d) and that though the offences were committed in Kent, the prisoners might be tried in Middlesex. (dd)

The prisoner stole a watch at Liverpool, and sent it by rail to a confederate in London, and it was held that the constructive possession, which is equivalent to the actual

(b) *Reg. v. Quinn*, 29 U. C. Q. B. 163, per *Richards*, C. J.

(c) *Ibid.* 158.

(cc) *Reg. v. O'Brien*, 13 U. C. Q. B. 436.

(d) See 32 & 33 Vic., c. 29, s. 9.

(dd) *Reg. v. Sharp*, 1 U. C. L. J. 17; *Dears. C. C.* 415.

possession, still remained in the prisoner, and **that**, under the Imp. 24 & 25 Vic., c. 96, s. 114 (by which the prisoner may be indicted where he has the property in his possession, though stolen in another part of the United Kingdom), he was triable at the Middlesex Sessions. (e)

Where a count for larceny charges the stealing of a great number of things, a general verdict of guilty will be supported by evidence that any one of the things mentioned has been stolen, notwithstanding there is no evidence as to the rest. (ee)

If larceny be committed by a lodger, the goods may be described as the property of the owner or person letting to hire. (f)

Stealing from the person.—To constitute a stealing from the person, the thing stolen must be completely removed from the person. (ff)

To constitute an attempt to steal, some act must be done towards the complete offence. Feeling a coat-tail to ascertain if there is anything in the pocket, is not an attempt to do the act of picking the pocket, for it may be that nothing was found to be in it, and therefore the prisoner does not proceed to the commission of the act itself, and, if there is nothing in the pocket, even putting the hand into it has been held not to be an attempt to steal. (g)

The prosecutor carried his watch in his waistcoat pocket, the chain attached passing through a buttonhole of the waistcoat, and being there kept from slipping through by a watch key. The prisoner took the watch out of the pocket, and drew the chain out of the buttonhole, but, his hand being seized, it appeared that, although the chain and key were drawn out of the buttonhole, the point of the key had caught up another button, and was thereby sus-

(e) *Reg. v. Rogers*, L. R. 1 C. C. R. 136; 37 L. J. (M. C.) 83.

(ee) *Reg. v. Johnson*, 4 U. C. L. J. 49; 1 Dears. & B. C. C. 340.

(f) 32 & 33 Vic., c. 21, s. 75; see *Reg. v. Healey*, 1 Mood. C. C. 1.

(ff) 2 Russ. Cr. 359.

(g) *Reg. v. Taylor*, 8 C. L. J. N. S. 55, per *Sergeant Cox*.

pended. It was held that the evidence was sufficient to warrant a conviction for stealing from the person. (*gg*)

In order to bring a case within the 32 & 33 Vic., c. 21, s. 44, as to obtaining property by threats, the demand, if successful, must amount to stealing, and to constitute a menace, within that section, it must be of such a nature as to unsettle the mind of the person upon whom it operates, and to take away from his acts that element of voluntary action which alone constitutes consent; it must, therefore, be left to the jury to say whether the conduct of the prisoner is such as to have had that effect upon the prosecutor. (*h*)

Where a policeman professing to act under legal authority threatens to imprison a person, on a charge not amounting to an offence in law, unless money be given him, and the person, believing him, gives the money, the policeman may be indicted under that section, although he might also have been indicted for stealing the money. (*i*)

Demanding, with menaces, money actually due is not a demanding with intent to steal (*j*)

Embezzlement.—This offence is defined to be the act of appropriating to himself that which is received by one person in trust for another. (*k*) But in this large sense it was not criminal at common law, nor has it been rendered so by statute. The legislature, however, has from time to time specified different classes of cases, all coming within the meaning of the term embezzlement in the above sense, which it has declared to be criminal. (*l*)

Embezzlement, in its usual and more limited acceptance, imports the reception of money belonging to the master or employer of him who receives it in the course of his duty,

(*gg*) *Reg. v. Simpson*, 1 U. C. L. J. 16; *Dears.* 621; 24 L. J. (M. C.) 7; see also *Reg. v. Thompson*, 1 Mood. C. C. 78.

(*h*) *Reg. v. Walton*, L. & C. 288; 32 L. J. (M. C.) 79.

(*i*) *Reg. v. Robertson*, L. & C. 483; 34 L. J. (M. C.) 35.

(*j*) *Reg. v. Johnson*, 14 U. C. Q. B. 569.

(*k*) *Reg. v. Cummings*, 4 U. C. L. J. 183, per *Blake*, Ch.

(*l*) *Ibid.*

and the fraudulent appropriation of that money before it gets into the possession of the master. (m)

To constitute the crime of embezzlement, there must be an *employment* as clerk or servant.

Thus the prisoner, not having been in the employ of the prosecutor, was sent by him to one M. with a horse, as to which M. and the prosecutor, who owned the horse, had had some negotiations, with an order to M. to give the bearer a cheque if the horse suited. Owing to a difference as to the price, the horse was not taken and the prisoner brought him back. Afterwards, on the same evening, the prisoner, without any authority from the prosecutor, took the horse to M. and sold it as his own property, or professing to have the right to dispose of it, and received the money, giving a receipt therefor. It was held that the employment had ceased, and that when the prisoner received the money he received it for his own use and not as clerk or servant of the prosecutor, and that therefore a conviction for embezzlement could not be sustained. (n)

But where a "charter master," who received a certain sum for every ton of coal he raised, was also allowed to sell coal for his employer, the owner of the colliery, it being the prisoner's duty to pay over the gross money received on such sales, he being subsequently allowed a poundage thereon: he was held guilty of embezzlement for having converted money received for coal to his own use, and neglected to account for it. (o)

A person who receives no remuneration for his services, is not a clerk or servant within the Act; (p) but that character may be established if the party is entitled to recover for his services on a *quantum meruit*. (q)

A mortgagor, though strictly a tenant at sufferance, cannot

(m) *Ferris v. Irwin*, 10 U. C. C. P. 117, per *Draper*, C. J.

(n) *Reg. v. Topple*, 3 Russell & C. 566.

(o) *Reg. v. Thomas*, 1 U. C. L. J. 37; 6 Cox, C. C. 403.

(p) *Reg. v. Tyree*, L. R. 1 C. C. R. 177; 38 L. J. (M. C.) 58.

(q) *Reg. v. Foulkes*, L. R. 2 C. C. R. 150.

be convicted of embezzlement in relation to the mortgaged property. (r)

It seems from the cases that a commercial traveller, whether paid by commission or salary, who is under orders to go here and there, is a clerk or servant within the meaning of the statute; (s) and this, though at liberty to take orders for others. (t) It is a question for the jury whether a person is a clerk or servant. (tt)

The employment to receive money may be sufficient, though receiving money is not the prisoner's usual employment, and though it may have been the only instance of his having been so employed. (u)

The chattels, moneys or valuable securities must be received *from third persons*; if from the employer himself, if any offence, it will amount to larceny. (v) This distinction is, however, of little practical importance, as section 74 of the statute under consideration provides that persons indicted for embezzlement may be convicted of larceny, and *vice versa*.

The money or securities must be received *in the name, or for, or on account of* the employer.

Thus, where the prisoner was apprenticed to a baker, and had authority from his master to deliver bills for bread to customers and receive the money, and in payment of one account took a bank cheque payable to his master's order, upon which he forged his master's name and received the money from the bank: it was held that the money received, never having been the property of his employer, but the property of the bank—the forgery not operating to discharge the bank—was not received for or on account of the master, and that therefore the person was not guilty of embezzlement. (w)

(r) *McGregor v. Scarlett*, 7 U. C. P. R. 20.

(s) *Arch. Crim. Pldg.* 448; *Reg. v. Mayle*, 11 Cox. 150; *Reg. v. Marshall*, 11 Cox, 490; but see *Reg. v. Bowers*, L. R. 1 C. C. R. 41; 35 L. J. (M. C.), 208; *Reg. v. Negus*, L. R. 2 C. C. R. 34.

(t) *Reg. v. Tite*, 7 U. C. L. J. 331; 30 L. J. (M. C.) 142.

(tt) See *Reg. v. Negus*, L. R. 2 C. C. R. 34.

(u) *Reg. v. Tongue*, 8 U. C. L. J. 55; Bell, 289; 30 L. J. (M. C.) 49.

(v) *Reg. v. Cummings*, 4 U. C. L. J. 182; 16 U. C. Q. B. 15.

(w) *Reg. v. Hathaway*, 6 Allen, 382.

So where the prisoner, the captain of a barge in the exclusive service of its owner, to whom the prisoner was bound to account for all its earnings, and having no authority to take any other cargoes than those appointed for him, took on board a certain cargo, though ordered not to carry it but to bring the vessel back empty, and received the freight therefor, and appropriated it to his own use, not professing to receive it for his master, and on being charged with disobedience to orders, declared that the vessel had come back empty; it was held that the money was not received for or on account of his master within the meaning of the Act. (x)

But where a clerk, whose duty it was to endorse cheques and hand them over to the cashier of the company in whose employ he was, endorsed several cheques and obtained money for them from friends of his own, and paid the proceeds over to the cashier, saying he wished them to go against his salary, which was overdrawn: on conviction, it was held that such proceeds were received on account of the company, and that the prisoner was therefore rightly convicted. (y)

The former statute, Con. Stat. Can., c. 92, rendered it necessary that the prisoner should have received the money "by virtue of such employment," and that the money was so received must have appeared in evidence; (z) but those words are omitted in the present enactment on the subject, so it is apprehended that if a clerk or servant receive money for his master and embezzle it, he may now be convicted of embezzlement, although it was neither his duty to receive it, nor had he authority to do so. (a)

The statute applies whether the employer be an individual or a corporation; and it has been held that friendly societies, though some of their rules may be in restraint of

(x) *Reg. v. Cullum*, L. R. 2 C. C. R. 28.

(y) *Reg. v. Gale*, L. R. 2 Q. B. D. 114.

(z) See *Reg. v. Thorley*, 1 Mood. C. C. 343; *Reg. v. Hawtin*, 7 C. & P. 281; *Reg. v. Mellish*, R. & R. 80; *Reg. v. Snowley*, 4 C. & P. 390; *Ferris v. Irwin*, 10 U. C. C. P. 116.

(a) See Arch. Cr. Pldg. 453.

trade, are entitled to the protection of the criminal law over their funds. (b)

Where the property was laid on a trustee of a savings bank, it was held not enough to show merely that the trustee acted as such on one occasion, without producing evidence of his appointment. (c)

Where a fund belonging to the late Trinity House was vested by statute in the master, deputy-master and wardens of the Trinity House of Montreal, the property was held properly laid in Her Majesty. (d)

It is no defence to an indictment for embezzlement that the prisoner intended to return the money fraudulently appropriated; (e) nor that he had entered the sum appropriated in his master's ledger. (f) And omitting to credit a sum received, but charging it as paid away, for the fraudulent purpose of concealing an appropriation, is ample to support a conviction. (g) But the prisoner must be shown to have received some particular sum, (h) and a general deficiency of account will not alone ground a conviction. (i) There have been several decisions, both in England and in this country, under the 32 & 33 Vic., c. 21, s. 76, and following sections, relating to frauds by persons intrusted, the results of which are given below.

As to intrusting.—The defendant, an attorney, was employed to raise a loan of money on mortgage, of which he was to apply a part in paying off an earlier mortgage, and hand over the rest to the mortgagor. He prepared the

(b) *Reg. v. Stainer*, L. R. J. 1 C. C. R. 230; 39 L. R. (M. C.) 54.

(c) *Reg. v. Essex*, 4 U. C. L. J. 73; Dears. & B. 371; 27 L. J. (M. C.) 20.

(d) *Reg. v. David*, 17 L. C. J. 310.

(e) *Reg. v. Cummings*, 4 U. C. L. J. 189, per *Spragge*, V. C.

(f) *Reg. v. Lister*, 3 U. C. L. J. 18; Dears. & B. 119; L. J. (M. C.) 26.

(g) *Reg. v. Cummings*, *supra*.

(h) *Reg. v. Chapman*, 1 C. & K. 119, per *Williams*, J.; *Reg. v. Jones*, 7 C. & P. 833, per *Bolland*, B.; *Reg. v. Wolstenholme*, 11 Cox, 313, per *Brett*, J.; but see *Reg. v. Lambert*, 2 Cox, 309, per *Erle*, J.; *Reg. v. Moah*, Dears. 626; 25 L. J. (M. C.) 66.

(i) *Reg. v. Jones*, 8 C. & P. 288, per *Alderson*, B.; *Reg. v. Cummings*, 4 U. C. L. J. 185, per *Draper*, C. J.

mortgage deed, received the mortgage money, and handed over the deed to the mortgagee in exchange. He then misappropriated a part of the money to his own use. It was held that he was not "intrusted" for any of the purposes mentioned in sections 76 or 77. (*j*)

And an agent who properly receives money by check payable to his own order, and deposits the same in his own bank, and fails to pay over, is not indictable under section 76 for having securities for special purpose without authority to negotiate. (*k*)

The words "or other agent" do not extend the meaning of the previous clause, "banker, merchant, broker, attorney," but only signify persons, the nature of whose occupation was such that chattels, valuable securities, etc., belonging to third persons would, in the usual course of their business, be intrusted to them. (*l*)

Where the prisoner, a stock and share broker, wrote to the prosecutrix, stating that he had purchased certain bonds for her, and enclosed a contract note with the letter, and the prosecutrix, in reply, sent the following: "I have just received your note and contract note for three I shares (those mentioned in the prisoner's letter), and enclose a cheque for £336 in payment;" and the prisoner never paid for the bonds, but in violation of good faith appropriated to his own use the proceeds of the cheque. It was held that the letter of the prosecutrix was a direction in writing within section 76, and that the prisoner was properly convicted. (*m*)

The power of attorney mentioned in section 78 must be a written one, and a merely verbal authority will not bring the defendant's act within the scope of that section. (*n*)

On an indictment under the corresponding English section of the 32 & 33 Vic., c. 21, s. 73, it appeared that the prisoner was a member of a copartnership. It was his duty to receive

(*j*) *Reg. v. Cooper*, L. R. 2 C. C. R. 123.

(*k*) *Reg. v. Tallock*, L. R. 2 Q. B. D. 157.

(*l*) *Reg. v. Hynes*, 13 U. C. Q. B. 194.

(*m*) *Reg. v. Christian*, L. R. 2 C. C. R. 94.

(*n*) *Reg. v. Chouinard*, 4 Q. L. R. 220.

money for the copartnership, and once a week to render an account, and pay over the gross amount received during the previous week, which was usually received in a number of small sums from day to day. He was indicted for embezzling three different sums, amounting, in the aggregate, to £3 13s., received into his possession on the 5th, 12th, and 17th days of December, 1870, respectively, being within six months from the first to the last of the said receipts. It appeared, in evidence, that the said aggregate sum was received by ten small payments for the first and second weeks respectively, and eleven small payments in the third week; and it was held that the prisoner might be properly charged with embezzling the weekly aggregates—that three acts of embezzlement of such weekly aggregates, within six months, might be charged and proved under one indictment, and that evidence of the small sums received during each week was admissible, to show how the weekly aggregates were made up. (o)

But if a man receives a number of small sums, and has to account for each of them separately, only three instances of failure to account can be proved under one indictment. In the above case, the prisoner might have been indicted for embezzling any of the separate small sums received by him. (p)

The 32 & 33 Vic., c. 29, s. 25, does not justify an allegation in an indictment of the embezzlement of money when a cheque only has been embezzled, and there is no proof that the prisoner has even cashed it. (q) But if the cheque is turned into money, the prisoner may be indicted for embezzling the money; and, upon such indictment, the embezzlement of the cheque, and conversion of it into money may be shown, or the prisoner may be indicted for the embezzlement of the cheque. (r)

(o) *Reg. v. Balls*, L. R. 1 C. C. R. 328.

(p) *Ibid.* 332-3, per Cockburn, C. J.

(q) *Reg. v. Keena*, L. R. 1 C. C. R. 113; 37 L. J. (M. C.) 43.

(r) *Ibid.* 114, per Cockburn, C. J.

In *Reg. v. Bullock*, (s) it was held, under the facts shown in the case, that the money was not improperly charged to be the money of the county of Essex, though it was received for the township of Maidstone, within the county, and was to be accounted for to it by the county; for, from the moment of payment, the county was responsible for the money, and had a special property in it.

A person who is nominated and elected assistant overseer, under the 59 Geo. III., c. 12, s. 7, by the inhabitants of a parish in vestry, and who is afterwards appointed assistant overseer by the warrant of two justices, and performs the duties of an overseer, is well described in an indictment for embezzlement as the servant of the inhabitants of the parish. (t)

It has been held that the form of indictment, given by the Con. Stats. Can., c. 99, s. 51, was only applicable to embezzlement under c. 92, s. 42. (u)

In an indictment for embezzlement, where the offence relates to any money, or any valuable security, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained by proof of the embezzlement of any amount, although the particular species of coin, or valuable security, of which such amount was composed, is not proved, etc. (v)

False pretences.—The law as to false pretences has been construed, of late years, in a much more liberal spirit than formerly; (w) still cases of considerable technical difficulty sometimes arise, so that a discussion of the various elements of the offence is necessary.

First, there must be a false pretence of an existing fact, and a mere promise to do an act will not suffice.

(s) 19 U. C. Q. B. 513.

(t) *Reg. v. Carpenter*, L. R. 1 C. C. R. 29; 35 L. J. (M. C.) 109.

(u) *Reg. v. Cummings*, 4 U. C. L. J. 182 (in E. & A.)

(v) 32 & 33 Vic., c. 21, s. 73; see *Reg. v. Hall*, 3 Stark, 67; R. & R. 463.

(w) *Reg. v. Lee*, 23 U. C. Q. B. 340, per Hagarty, J.

Thus, procuring a promissory note, by a promise to give the prosecutor \$600 on what he would have out of the proceeds of the note, when discounted, is not sufficient to sustain a conviction. (x)

And where D. was to pay for all goods supplied to the prisoner to the amount of a certain promissory note held by the prisoner against D., the amounts supplied to be endorsed on the note; and the prisoner obtained goods without producing the note, saying he would bring it down and have the amount endorsed in a day or two, but intending not to do so nor to pay for the goods. The prisoner having been found guilty, was held to have been improperly convicted. (y)

But inducing a person to buy certain packages by representing that they contained good tea, when three-fourths of their contents were, to the prisoner's knowledge, not tea at all, but a mixture of substances unfit to drink, is a false representation of an existing fact. (z)

So the selling of a railway pass, good only to carry a particular person, and which the purchaser could not use except by committing a fraud upon the railway company, and at the risk of being at any moment expelled from the train, is a false pretence within the statute. (a)

So a false representation by a married man that he is single, thereby inducing a single woman to part with her money to him, for the purpose of furnishing a house, is a false pretence; and one false fact by which money is obtained is sufficient to support an indictment, although it may be united with false promises which would not of themselves do so. (b)

The giving a cheque does not amount to a representation that there is money of the drawer's at the bank indicated,

(x) *Reg. v. Pickup*, 10 L. C. J. 310.
 (y) *Reg. v. Bertle*, 13 U. C. C. P. 607.
 (z) *Reg. v. Foster*, L. R. 2 Q. B. D. 301.
 (a) *Reg. v. Abrahams*, 24 L. C. J. 325.
 (b) *Reg. v. Jennison*, 9 U. C. L. J. 83; 6 L. T. Reps. N. S. 256; 31 L. J. (M. C.) 146; *Reg. v. Lee*, 23 U. C. Q. B. 340, per *Hagarty*, J.

but it is a representation of authority to draw, or **that it is a valid order for payment of the amount.** (c)

The false representation by a person that he is in a large way of business, whereby he induces another to give him goods, is a false pretence. (d) So also is the obtaining a loan upon the security of a piece of land, by falsely and fraudulently representing that a house is built upon it. (e) And threatening to sue on a note which the prosecutor had made in favor of the prisoner, and which the prisoner had negotiated but pretended he was still the holder of, and thereby induced the prosecutor to pay, is a false pretence. (f)

And under the more recent decisions, the execution of a contract, between the same parties, does not secure from punishment the obtaining of money under false pretences in conformity with that contract. (g)

Fraudulently misrepresenting the amount of a bank note, and thereby obtaining a larger sum than its value in change, is obtaining money by false pretences, although the person deceived has the means of detection at hand, and the note is a genuine bank note. (h)

And where a prisoner obtained money and goods, by pretending that a piece of paper was the bank note of an existing solvent firm, knowing that the bank had stopped payment forty years before, he was held guilty of false pretences. (i) But the fact that a bank note was the note of a private bank, which had paid a dividend of 2s. 4d. on the pound, and no longer existed, and that a neighboring bank would not

(c) *Reg. v. Hazleton*, L. R. 2 C. C. R. 134.

(d) *Reg. v. Cooper*, L. R. 2 Q. B. D. 510; *Reg. v. Crab*, 5 U. C. L. J.N. S. 21, per *Kelly*, C. B.; 11 Cox, 85.

(e) *Reg. v. Burgon*, 2 U. C. L. J. 138; *Dears. & B.* 11; 25 L. J. (M. C.) 105; *Reg. v. Huppel*, 21 U. C. Q. B. 281.

(f) *Reg. v. Lee*, 23 U. C. Q. B. 340.

(g) See *Reg. v. Abbott*, 1 Den. 173; 2 C. & K. 630; *Reg. v. Boss*, Bell, 208; 29 L. J. (M. C.) 86; *Reg. v. Meakin*, 11 Cox, 270; *Arch. Cr. Pldg.* 473.

(h) *Reg. v. Jessop*, 4 U.C.L.J. 167; *Dears. & B.* 442; 27 L. J. (M.C.) 70.

(i) *Reg. v. Dowey*, 16 W. R. 344; 37 L. J. (M.C.) 52; and see *Reg. v. Brady*, 26 U. C. Q. B. 14.

~~change it~~, was held not sufficient from which to infer that ~~the~~ note was of no value whatever. (j)

Upon an indictment alleging that the prisoner obtained a ~~coat~~, by falsely pretending that a bill of parcels of a coat of ~~the~~ value of 14s. 6d., of which 4s. 6d. had been paid on ~~account~~, was a bill of parcels of another coat of the value of 22s., which the prisoner had had made to measure, and that 10s. only were due, it was proved that the prisoner's wife had selected the 14s. 6d. coat for him, at the prosecutor's shop, subject to its fitting on his calling to try it on, and had paid 4s. 6d. on account, for which she received a bill of parcels giving credit for that amount. On the prisoner's calling to try on the coat, it was found to be too small, and he was then measured for one, which he ordered to be made, to cost 22s.; and on the day named for trying on that coat he called, and the coat was fitted on by the prosecutor, who had not been present on the former occasion; and the case stated that the prisoner, on the coat being given to him, handed 10s. and the bill of parcels for the 14s. 6d. coat, saying, "There is 10s. to pay," which bill the prosecutor handed to his daughter, to examine, and upon that the prisoner put the coat under his arm, and, after the bill of parcels referred to had been handed to him with a receipt, went away. The prosecutor stated that, believing the bill of parcels to be a genuine bill, and that it referred to the 22s. coat, he parted with that coat on payment of the 10s., which otherwise he should not have done. It was held that there was evidence to go to the jury, and that the conviction was right. (k)

Where a prisoner, who had been discharged from A.'s service, went to the store of O. and S., and representing himself as still in the employ of A., who was a customer of O. and S., asked for goods in A.'s name, which were sent to A.'s house, where the prisoner preceded the goods, and, as soon as the clerk delivered the parcel, snatched it from him, saying, "This is for me; I am going in to see A.;" but instead of doing

(j) *Reg. v. Evans*, 6 U. C. L. J. 262; Bell, 187; 29 L. J. (M.C.) 20.

(k) *Reg. v. Steele*, 16 W. R. 341.

so, walked out of the house with the parcel. It was held that the prisoner was rightly convicted of having obtained the goods from O. and S. under false pretences. (l)

The false pretence may be of a past or an existing fact. (m)

It would seem that indefinite or exaggerated praise, upon a matter of indefinite opinion, cannot be made the ground of an indictment for false pretences. (n)

But where the prisoner induced the prosecutor to purchase a chain from him, by fraudulently representing to him that it was 15 carat gold, when, in fact, it was only of a quality a trifle better than 6 carat, knowing at the time that he was falsely representing the quality of the chain, it was held that the statement was not mere exaggerated praise, nor relating to a mere matter of opinion, but a statement as to a specific fact within the knowledge of the prisoner, and a false pretence. (o) It would seem, from this case, that a specific representation of quality, if known to be false, is within the statute. (p)

Not only is a false pretence of an existing fact necessary, but the prosecutor must have been induced to part with his property in consequence thereof; (q) and if the money is parted with from a desire to secure the conviction of the prisoner, there is no obtaining by false pretences. (r)

And where the defendant made false representations to the prosecutor, and thereby induced him to sell his horses to him, but the prosecutor afterwards, on learning the falsity of the representations, entered into a new agreement in writing

(l) *Reg. v. Robinson*, 9 L. C. R. 278.

(m) *Reg. v. Gemmell*, 26 U. C. Q. B. 314, per *Hagarty*, J.; *Reg. v. Giles*, 11 L. T. Rep. N. S. 643; 10 Cox, 44.

(n) *Reg. v. Goss*, Bell, 208; 29 L. J. (M.C.) 90, per *Erle*, C. J.; *Reg. v. Bryan*, Dears. & B. 265; 26 L. J. (M. C.) 84; see also *Reg. v. Watson*, Dears. & B. 348; 27 L. J. (M. C.) 18, per *Erle*, J.; *Reg. v. Levine*, 10 Cox, 374.

(o) *Reg. v. Ardley*, L. R. 1 C. C. R. 301.

(p) But see *Reg. v. Hagleton*, 1 U. C. L. J. 179; Dears. 515; 24 L. J. (M. C.) 158.

(q) *Reg. v. Gemmell*, 26 U. C. Q. B. 312.

(r) *Reg. v. Mills*, 29 L. T. Reps. 114; Dears. & B. 205; 26 L. J. (M. C.) 79; *Reg. v. Gemmell*, 26 U. C. Q. B. 315, per *Hagarty*, J.; see also *Reg. v. Dale*, 7 C. & P. 352; *Reg. v. Roebuck*, Dears. & B. 25; 25 L. J. (M. C.) 101.

with the prisoner ; it was held that the subsequent dealings repelled the idea that the prosecutor had parted with his property in consequence of the false pretence. (s)

The false pretence must be the proximate cause of the loss.

Thus an indictment for obtaining from A. \$1,200 by false pretences, was not supported by proof of obtaining A.'s promissory note for that sum, which A. afterwards paid before maturity, inasmuch as it was an engagement or promise to pay at a future date, and, though remotely, the payment arose from the false pretence ; yet immediately and directly it was made, because the prosecutor desired to retire his note, and did so before it became due, and though the false pretences on which the note was obtained might be said to be continuing, they were not, according to the evidence, made or renewed when the note was paid. (t)

And where a person, by falsely representing himself to be another person, induced another to enter into a contract with him for board and lodging, and was supplied accordingly with various articles of food : it was held that the obtaining of the goods was too remotely connected with the false representation to support a conviction. (u)

But a conviction for obtaining a chattel by false pretences is good, although the chattel is not in existence at the time the pretence is made, provided the subsequent delivery of the chattel is directly connected with the false pretence. (v) The test is the continuance of the pretence down to the time of delivery, and the direct connection between the pretence and delivery. (w)

It is essential that there should be an intention to deprive the owner wholly of the property in the chattel, and an obtaining by false pretences the use of a chattel for a limited time only, without an intention to deprive the owner wholly

(s) *Reg. v. Connor*, 14 U. C. C. P. 529.

(t) *Reg. v. Brady*, 26 U. C. Q. B. 13.

(u) *Reg. v. Gardner*, 2 U. C. L. J. 139 ; *Dears. & B.* 40 ; 25 L. J. (M.C.) 100 ; see, however, comments on this case in *Reg. v. Martin*, L.R. 1 C.C.R. 56, *infra*.

(v) *Reg. v. Martin*, L. R. 1 C. C. R. 56 ; 36 L. J. (M. C.) 20.

(w) *Ibid.* 60, per *Bovill*, C. J.

of the chattel, is not an obtaining by false pretences within the statute. (x)

But it is none the less a false pretence that the prisoner intended to, and did in fact pay over the money to the person properly entitled, if, by the false pretence, he attained a personal end; as where an attorney, who had been struck off the rolls, obtains money out of court under such circumstances as amount to a false pretence practised on the court, so that he may retain his costs thereout. (y) And it seems the offence would have been the same whatever the prisoner's object. (z)

Although inducing a person to execute a mortgage on his property, (a) or to sign an acceptance to a bill of exchange, (b) it not appearing that the paper on which it was drawn belonged to the prosecutor, is not obtaining from him a valuable security within the meaning of section 93 of the Act, yet the offence is indictable under sec. 95.

It is not necessary that the pretence should be in words; the conduct and acts of the party will be sufficient without any verbal representation.

Thus, an indictment alleging that the prisoner was in the employ of V. as a heaver of coals, and was entitled to 5d. for every tub filled by him, and that, by unlawfully placing a token upon a tub of coals, he falsely pretended that he had filled it, whereby he obtained 5d., was held to disclose a false pretence. (c)

And a person who tenders another a promissory note of a third party in exchange for goods, though he says nothing, yet he should be taken to affirm that the note has not to his knowledge been paid, either wholly, or to such an extent as almost to destroy its value. (d)

(x) *Reg. v. Kilham*, L. R. 1 C. C. R. 261; 39 L. J. (M.C.) 109.

(y) *Reg. v. Parkinson*, 41 U. C. Q. B. 545.

(z) *Ibid.*

(a) *Reg. v. Brady*, 26 U. C. Q. B. 13.

(b) *Reg. v. Danger*, Dears. & B. 307; 26 L. J. (M. C.) 185.

(c) *Reg. v. Hunter*, 16 W.R. 343; 10 Cox, 642; *Reg. v. Carter*, *ibid.* 648.

(d) *Reg. v. Davis*, 18 U. C. Q. B. 180; *Reg. v. Brady*, 26 U. C. Q. B. 14.

The crime of obtaining goods by false pretences is complete, although, at the time when the prisoner made the pretence and obtained the goods, he intended to pay for them when it would be in his power to do so. (e)

Formerly, if on an indictment for obtaining, etc., by false pretences, it was proved that the property was obtained in such a manner as to amount to larceny, the defendant was entitled to an acquittal, the misdemeanor being merged in the felony (f)

The true meaning of this clause is, that, if the obtaining by false pretences is proved, as it is laid in the indictment, the defendant is not entitled to be acquitted of the misdemeanor, simply because the case amounts to larceny. (g)

The effect of the statute seems to be merely to prevent the operation of that rule by which a misdemeanor merged in a felony, when the facts disclosed the latter crime. It is apprehended that a party could not be convicted under this clause, unless there was sufficient proof of an obtaining by false pretences.

Upon an indictment containing several counts for obtaining money under false pretences, the evidence went to show that the defendant had, by fraudulent misrepresentations of the business he was doing in a trade, induced the prosecutor to enter into a partnership agreement, and advance £500 to the concern; but it did not appear that the trade was altogether a fiction, or that the prosecutor had repudiated the partnership. The question for the court being whether, upon such evidence, the jury were bound to convict the defendant, it was held that he was entitled to an acquittal, as it was consistent with the evidence that the prosecutor, as partner, was interested in the money obtained. (h)

(e) *Reg. v. Naylor*, L. R. 1 C. C. R. 4; 35 L. J. (M. C.) 61.

(f) 32 & 33 Vic., c. 21, s. 93.

(g) *Reg. v. Bulmer*, L. & C. 476; 33 L. J. (M. C.) 171; 9 Cox, 492; Arch. Cr. Pldg. 483.

(h) *Reg. v. Watson*, 4 U. C. L. J. 73; Dears. & B. 348; 27 L. J. (M. C.) 18.

Where a defendant, on an indictment for obtaining money by false pretences, has been found "guilty of larceny," the court had no power, under the Con. Stats. U. C., c. 112, s. 3, to direct the verdict to be entered as one of "guilty," without the additional words, "of larceny." (i)

A letter, containing a false pretence, was received by the prosecutor through the post, in the borough of C.; but it was written and posted out of the borough. In consequence of that letter, he transmitted through the post, to the writer of the first, a Post Office order for £20, which was received out of the borough; and it was held that, in an indictment against the writer of the first letter, for false pretences, the venue was well laid in the borough of C. (j)

Where the venue, in an indictment for obtaining sheep by false pretences, was laid in county E., where the person was convicted, and it appeared that the sheep had been obtained by the prisoner in county M., and that he conveyed them into county E., where he was apprehended; it was held that he had been indicted in a wrong county. (k)

Our form of indictment for obtaining money by false pretences does not require the pretences to be set out, but simply that the prisoner, "by false pretences, did obtain," etc. It is apprehended that it will be sufficient to follow the statutory form, and that the false pretence of an existing fact need not be set out. (l)

To sustain an indictment for obtaining, or attempting to obtain, money by false pretences, the indictment, if not in the statute form, must state with certainty the pretence of a supposed existing fact.

Thus, a statement that prisoner pretended to H. P. (the manager of T.'s business) that H. P. was to give him 10s., and that T. was going to allow him 10s. a week, was held insufficient. (m)

(i) *Reg. v. Ewing*, 21 U. C. Q. B. 523.

(j) *Reg. v. Leech*, 2 U. C. L. J. 138; Dears. 642; 25 L. J. (M. C.) 77.

(k) *Reg. v. Stanbury*, 8 U. C. L. J. 279; L. & C. 128; 31 L. J. (M. C.) 88.

(l) See *Reg. v. Oates*, 1 U. C. L. J. 135; Dears. 459; 24 L. J. (M. C.) 123; *Reg. v. Dessemer*, 21 U. C. Q. B. 231.

(m) *Reg. v. Henshaw*, L. & C. 444; 33 L. J. (M. C.) 132.

A municipality having provided some wheat for the poor, the defendant obtained an order for fifteen bushels, described as "three of golden drop, three of fife, nine of milling wheat." Some days afterwards he went back, and represented that the order had been accidentally destroyed, when another was given to him. He then struck out of the first order "three of golden drop, three of fife," and, presenting both orders, obtained, in all, twenty-four bushels. The indictment charged that the defendant unlawfully, fraudulently, and knowingly, by false pretences, did obtain an order from A., one of the municipality of B., requiring the delivery of certain wheat, by and from one C., and, by presenting the said order to C., did fraudulently, knowingly, and by false pretences, procure a certain quantity of wheat, to wit, nine bushels of wheat from the said C., of the goods and chattels of the said municipality, with intent to defraud. It was held that the indictment was sufficient in substance, and not uncertain or double, but in effect charging that defendant obtained the order, and, by presenting it, obtained the wheat by false pretences. (n)

An indictment, charging that defendant, by false pretences, did obtain board of the goods and chattels of the prosecutor, was held bad, the term "board" being too general. (o)

An indictment for obtaining by false pretences goods and chattels, or a chattel of the prosecutor, not defining them or it, would be insufficient. There must be the same particularity as in larceny, that the party may know certainly what he is charged with stealing, or obtaining by false pretences. (p) The prosecutor is not bound to deliver to the defendant the particulars of the crime charged against him. (q)

An indictment, for obtaining money or goods by false pretences, must have stated whose the money was, or goods were. (r) But the allegation of ownership is rendered unne-

(n) *Reg. v. Campbell*, 18 U. C. Q. B. 413.

(o) *Reg. v. McQuarrie*, 22 U. C. Q. B. 600.

(p) *Ibid.* 601, per *Draper*, C. J.

(q) *Reg. v. Senecal*, 8 L. C. J. 286.

(r) *Reg. v. McDonald*, 17 U. C. C. P. 638, per *A. Wilson*, J.; *Reg. v. Martin*, 8 A. & E. 481.

cessary by the 32 & 33 Vic., c. 21, s. 93. By the same section, a general allegation that the party accused did the act, with intent to defraud, is sufficient, without alleging an intent to defraud any person.

An allegation in a count for obtaining a cheque, describing it "for the sum of £8 14s. 6d. of the moneys of William Willis," sufficiently describes the ownership of the cheque, for the words "of the moneys" may be rejected. (s)

Having treated specifically of the offences of larceny, embezzlement, and the obtaining of money by false pretences, we proceed to point out the distinctions between them. It is of the essence of the offence of larceny that the property be taken against the will of the owner. (t) If taken by the consent of the owner, for instance, if he intends to part with the property, no larceny will be committed.

In false pretences the property is obtained with the consent of the owner, the latter intending to part with his property. (u) The crime is constituted by the pretence that something has taken place, which, in fact, has not. (v) It, therefore, necessarily differs from larceny, in the fact the *property* in the chattel passes to the person obtaining it, and that the owner is induced to voluntarily part with his property, in consequence of some false pretence of an existing fact, made by the person obtaining the chattel. But the crime of obtaining money by false pretences is similar to larceny in this, that, in both offences, there must be an intention to deprive the owner wholly of his property in the chattel. (w)

Embezzlement consists in obtaining the lawful possession of goods, etc., without fraud or any false pretence, as upon a contract, or with the consent of the owner, in the ordinary course of duty or employment, or independently of such em-

(s) *Reg. v. Godfrey*, 4 U. C. L. J. 167 ; *Dears. & B. C. C.* 426.

(t) *Reg. v. Prince*, L. R. 1 C. C. R. 154, per *Bavill*, C. J.

(u) See *White v. Garden*, 10 C. B. 927, per *Talfourd*, J.

(v) *Reg. v. McGrath*, L. R. 1 C. C. R. 209, per *Kelly*, C. B.

(w) See *Reg. v. Kilham*, L. R. 1 C. C. R. 261.

ployment, and subsequently converting the goods, with a felonious intent to deprive the owner of his property therein. It differs from larceny in this, that the possession of the goods, etc., is lawfully obtained, in the first instance, without the ingredient of trespass, and the conversion takes place while the privity of contract exists between the parties. The acquisition of lawful possession, in the first instance, is the constituent feature of this offence, and, according to the doctrines of the common law, no larceny could be committed by a bailee or other person, whose original title was lawful, until the privity of contract was determined. A carrier could not be convicted of larceny unless he "broke bulk," and the reason was that the act of "breaking bulk" was an act of trespass in the carrier, by which the privity of contract was determined. Now, however, the carrier is guilty of larceny, although he do not break bulk or otherwise determine the bailment. (x)

The distinction between larceny and embezzlement may be illustrated by the case of a clerk or servant, whose duty it is to receive money for, or on account of, his master. An appropriation before the money, etc., comes into the actual possession of the master, as if a clerk in a shop, on receiving money, puts it into his pocket before putting it into the till, would be embezzlement. (y) But if the money is put in the till, or otherwise becomes actually in the master's possession before appropriation, and is, in the act of appropriation, taken out of the possession of the master, this is larceny at common law.

But these distinctions are not of such practical importance as formerly, for now, in either of the above cases, whether the indictment be framed for larceny or embezzlement, the defendant may be convicted of the offence proved in evidence, (z) and a person indicted for obtaining money by

(x) See 32 & 33 Vic., c. 21, s. 3.

(y) *Reg. v. Bull*, 2 Leach, 841; *Reg. v. Bayley*, 2 Leach, 835; *Reg. v. Sullens*, 1 Mood. C. C. 129; *Reg. v. Walsh*, R. & R. 218; *Reg. v. Masters*, 1 Den. 332; 2 C. & K. 930; 18 L. J. (M. C.) 2.

(z) See 32 & 33 Vic., c. 21, s. 74.

false pretences may be convicted of that offence, although the facts proved also show a larceny. (a)

Receiving stolen goods.—This offence was punishable at common law only as a misdemeanor, even when the principal had been found guilty of felony in stealing the goods; (b) and the mere receipt of stolen goods did not, at common law, constitute the receiver an accessory, but was a misdemeanor, punishable by fine and imprisonment, (c) unless he likewise received and harbored the thief. (d)

There must be a stealing of goods, and the stealing must be a crime, either at common law or by statute, before a party is liable to be convicted of receiving. (e)

A conviction of the principal for embezzlement is sufficient to warrant a conviction of the receiver, by virtue of the express words of sec. 100 of the 32 & 33 Vic., c. 21. (f)

The goods must be *stolen* goods at the time of their receipt.

Thus where four thieves stole goods from the custody of a railway company, and afterwards sent them in a parcel, by the same company's line, addressed to the prisoner. During the transit the theft was discovered, and on the arrival of the parcel at the station for its delivery, a policeman in the employ of the company opened it, and then returned it to the porter, whose duty it was to deliver it, with instructions to keep it until further notice. On the following day the policeman directed the porter to take the parcel to its address, where it was received by the prisoner, who was afterwards convicted of receiving the goods, knowing them to be stolen. Upon an indictment, which laid the property in the goods in the railway company, it was held, (g) that the goods had got back into the possession of the owner, so as to be no

(a) 32 & 33 Vic., c. 21, s. 93.

(b) 2 Russ. Cr. 542.

(c) *Ibid.* 554.

(d) *Reg. v. Smith*, L. R. 1 C. C. R. 270, per Bovill, C. J.

(e) *Ibid.* 266; 39 L. J. (M. C.) 112.

(f) *Reg. v. Frampton*, Dears. & B. 585; 27 L. J. (M. C.) 229; Arch. Cr. Pldg. 436.

(g) By *Martin, B.*, and *Keating and Lush, JJ.*; *dissentientibus, Erle, C.J.*, and *Mellor, J.*

longer stolen goods, and that the conviction, on that ground, was wrong. (*h*)

Again, stolen goods were found in the pocket of the thief by the owner, who sent for a policeman. The policeman took the goods, and the three went together towards the shop of A., where the thief had previously sold stolen goods. When near it, the policeman gave back the goods to the thief, who was sent, by the owner, to sell them where he had sold the others. The thief then went alone into A.'s shop and, sold the goods to him, and returned with the proceeds to the owner. It was held that, under these circumstances, A. could not be convicted of receiving stolen goods, for when the goods came to the prisoner's hands, they were not stolen goods. (*i*)

On an indictment for stealing and receiving a mixture, it appeared that the thief had stolen two sorts of grain, and then mixed them, and sold them to the prisoner: it was held that the latter (the receiver) could not be convicted on such an indictment, for the indictment charged a receiving of a mixture, which had been stolen, knowing it, *i.e.* the mixture, to have been stolen, but the only evidence showed that pure oats and pure peas were stolen, and afterwards mixed and sold to the prisoner—so that the one prisoner did not steal a mixture, and the other did not receive, as the indictment alleged, a mixture which had been stolen, for the mixture had not been stolen. (*j*)

Previously to the 32 & 33 Vic., c. 21, s. 103, if two defendants were indicted jointly for receiving, a joint act of receiving must have been proved in order to convict both; (*k*) but that statute now extends to cases, where, upon an indictment for a joint receipt, it is proved that each of the prisoners separately received the whole of the stolen property at different times, the one receipt subsequent to the other; and it makes no difference whether the receipt was direct from

(*h*) *Reg. v. Schmidt*, L. R. 1 C. C. R. 15; 35 L. J. (M. C.) 94.

(*i*) *Reg. v. Dolan*, 1 U. C. L. J. 55; Dears. 463; 24 L. J. (M. C.) 59.

(*j*) *Reg. v. Robinson*, 1 U. C. L. J. N. S. 53; 4 F. & F. 43.

(*k*) *Reg. v. Messingham*, 1 Mood. C. C. 257.

the thief, or from an intermediate person. There is no distinction between separate receipts of the whole, and of part of the property ; (l) and, under s. 102, there is no distinction between separate receipts at the same time and separate receipts at different times. (m)

The goods stolen must be received by the defendant, and though there be proof of a criminal intent to receive, and a knowledge that the goods were stolen, if the exclusive possession still remains in the thief, a conviction for receiving cannot be sustained. (n) It is also necessary that the defendant should, at the time of receiving the goods, know that they were stolen. (o)

Where a husband and wife are indicted for receiving, it is proper that the jury should be asked whether the wife received the goods either from or in the presence of her husband, and where the question was not put, and both husband and wife were convicted, the court quashed the conviction of the wife. (p)

Where, on a joint indictment against husband and wife for receiving goods with a guilty knowledge, the indictment found specially that the wife did so receive, and that the husband "adopted the wife's receipt," it was held that the latter words were not equivalent to a verdict of guilty against the husband. (q)

Upon an indictment for feloniously receiving a hat and a watch, it was proved that, in consequence of information received from L. (the thief), a constable went to a room in a lodging house, where the prisoner slept, and, in a box in that room, found the stolen hat. The prisoner produced it at once, and admitted that L. had brought it there, but denied any knowledge of the watch. On the following day he was taken into custody, and after he had left the house, he told

(l) *Reg. v. Reardon*, L. R. 1 C. C. R. 31 ; 35 L. J. (M. C.) 171.

(m) *Reg. v. Reardon*, L. R. 1 C. C. R. 32, per *Pollock*, C. B.

(n) *Reg. v. Wiley*, 2 Den. 37 ; 20 L. J. (M. C.) 4 ; Arch. Cr. Pldg. 436.

(o) *Ibid.* 437.

(p) *Reg. v. Wardroper*, 6 U.C.L.J. 262 ; 1 Ball, C.C. 249 ; see also *Reg. v. Archer*, 1 Mood. C. C. 143.

(q) *Reg. v. Dring*, 4 U. C. L. J. 26 ; Dears. & B. 329.

the constable that he knew where the watch was, but did not like to say anything about it before the people in the house. The watch was not found at the first place to which he took the constable, but he afterwards sent a boy for it, and the boy having brought it to him, he gave it to the constable. This was held sufficient evidence to go to the jury of a felonious receiving. (r)

On an indictment for feloniously receiving goods, knowing them to have been stolen; it is unsafe to convict a party as receiver on the evidence of the thief, unless it is confirmed, for otherwise it would be in the power of a thief, from malice or revenge, to lay a crime on any one against whom he had a grudge. (s)

Forgery.—This offence is defined as the fraudulent making or alteration of a writing to the prejudice of another man's right, (t) or as a false making, or making *malo animo*, of any written instrument, for the purpose of fraud and deceit. (u)

Forgery takes a very wide range, and includes within it fraudulent acts and fabrications, of various descriptions and classes, effected in the numberless ways to which the evil ingenuity of crime can resort. (v) But it is said that the offence consists in the false making of an instrument purporting to be that which it is not, and not the making of an instrument purporting to be that which it really is, but which contains false statements; and that telling a lie does not become a forgery, because it is reduced to writing. (w)

The instrument must carry, on the face of it, the semblance of that for which it is counterfeited, and not be illegal in its very frame, though it is immaterial whether, if genuine, it would be of validity or not. (x)

(r) *Reg. v. Hobson*, 1 U. C. L. J. 36; Dears. C. C. 400.

(s) *Reg. v. Robinson*, 1 U. C. L. J. N. S. 53; 4 F. & F. 43.

(t) *Re Smith*, 4 U. C. P. R. 216, per *A. Wilson, J.*; and see *Reg. v. Smith*, 1 Dears. & B. 566.

(u) *Hall v. Carty*, 1 James, 385, per *Bliss, J.*

(v) *Ibid.*

(w) *Ex parte Lamirande*, 10 L. C. J. 290, per *Drummond, J.*

(x) *Reg. v. Brown*, 3 Allen, 15 per *Carter, C. J.*

On the above principles, the forging or uttering, in this country, a writing purporting to be a bank note, issued by a foreign banking company, amounts to the crime of forgery, though it is not proved that the company had power, by charter, to issue notes of that description; (y) it being shown that the note carried on its face the semblance of a bank note, issued by such company, and there being nothing in its frame to show it illegal. Even if the illegality were a defence, the *onus* of proving it would lie on the prisoner. (z) It is no objection that the note is payable in such foreign country. (a)

A person, having an order for delivery of wheat for the support of the poor persons in a municipality, is guilty of forgery, if he materially alters the order, so as to increase the quantity of wheat which is obtainable thereunder, with intent to defraud. (b)

So it is forgery to execute a deed in the name of, and as representing, another person, with intent to defraud, even though the prisoner has a power of attorney from such person, but fraudulently conceals the fact of his being only such attorney, and assumes to be principal. (c)

But a man who gives a cheque as his own, merely signing a fictitious name, and not intending to pass it off as the cheque of a person other than himself, is not guilty of forgery. (d)

It is forgery, both at common law and within the meaning of the 32 & 33 Vic., c. 19, s. 23, to make a deed fraudulently, with a false date, when the date is a material part of the deed, although the deed is, in fact, made and executed by and between the persons by and between whom it purports to be made and executed. (e)

(y) *Reg. v. Brown*, 3 Allen, 13.

(z) *Ibid.* 15, per Carter, C. J.; *Reg. v. Partis*, 40 U. C. Q. B. 214.

(a) *Ibid.*

(b) *Reg. v. Campbell*, 18 U. C. Q. B. 416, per Robinson, C. J.

(c) *Reg. v. Gould*, 20 U. C. C. P. 159, per Gwynne, J.

(d) *Reg. v. Martin*, L. R. 5 Q. B. D. 34.

(e) *Reg. v. Ritson*, L. R. 1 C. C. R. 200; 39 L. J. (M. C.) 10.

It was the duty of the prisoner, a railway station master, to pay B. for collecting and delivering parcels; and the company provided a form in which the charges were entered by the prisoner under the heads of "Delivery" and "Collecting" respectively. The prisoner having falsely told B. that the company would not pay for delivering, but only for collecting, continued to charge the company for collecting and delivering; and in order to furnish a voucher, after paying B.'s servant the sum entered in the form for collecting, and obtaining his receipt, in writing, for that amount, without either his or B.'s knowledge, put a receipt stamp under his servant's name, and put therein, in figures, a larger sum than he had paid, being the aggregate for collecting and delivery. This was held a forgery. (*f*)

Where, on an indictment for forgery, it appeared that a promissory note had been drawn by the prisoner, payable, two months after date, to the order of one J. S., and afterwards endorsed by said S.: the prisoner then altered the note, by making it payable three months after date, and discounted it at the bank of British North America, in London, Ontario. The jury having convicted him of forgery, on motion for a new trial, on the ground that the forgery or uttering, if any, was a forgery of or the uttering of a forged endorsement, the note having been made by the prisoner himself, and that there was no legal evidence of an intent to defraud, it was held that the altering of the note while it was in his own possession, after endorsement, was a forgery of a note, and not of an endorsement, and that the passing of the note to a third party, who was thereby defrauded, was sufficient evidence of an intent to defraud. (*g*)

The instrument must be made with intent to defraud, which is the chief ingredient in the offence; (*h*) and the

(*f*) *Reg. v. Griffiths*, 4 U. C. L. J. 240; *Dears. & B.* 548; 27 L. J. (M. C.) 205.

(*g*) *Reg. v. Craig*, 7 U. C. C. P. 239; *Reg. v. McNevin*, 2 *Revue Leg.* 711.

(*h*) 2 *Russ. Cr.* 774; *Reg. v. Craig*, *supra*, 244, per *Draper*, C. J.; *Reg. v. Dunlop*, 15 U. C. Q. B. 119, per *Robinson*, C. J.

writing of a signature in sport, without any intention to defraud, or pass it off as genuine, is not a forgery. (i)

A man may draw a promissory note for any sum he pleases, and in favor of any person, and payable to him, or to his order, or to bearer, and on demand, or at any time after date, at any place, and, so long as it remains simply as his own promissory note, in his own possession, and charging no other person but himself with liability, he may alter it, at his own free will, in all or any particulars. But that right of alteration ceases when another person becomes interested in the note, either by acquiring it as his own property, or by becoming a party to or responsible for its payment; and an alteration then made, prejudicial to any such person, and under circumstances which afford ground for inferring an intention to defraud, is a criminal act. It would seem that, even after another person becomes a party to the note—if, for instance, the note was made by the prisoner, and endorsed by another, but still retained in the hands of the prisoner, and not uttered as genuine, there would be nothing to establish the intention to defraud, and the prisoner could not be convicted of forgery. (j)

Sending a telegraphic message in the name of another, authorizing the receiver to advance money to the sender, is a forgery. (k)

The act of "forging, coining, etc., spurious silver coin," does not constitute the crime of forgery. (l)

Under the 32 and 33 Vic., c. 19, s. 51, the indictment need not allege an intent to defraud any person. (m) Nor is it necessary to prove an intent to defraud any particular person, but it is sufficient to prove that the party accused did the act charged, with intent to defraud. (n)

(i) *Reg. v. Dunlop*, 15 U. C. Q. B. 119, per *Robinson*, C. J.

(j) *Reg. v. Craig*, 7 U. C. C. P. 241, per *Draper*, C. J.

(k) *Reg. v. Stewart*, 25 U. C. C. P. 440.

(l) *Re Smith*, 4 U. C. P. R. 215.

(m) See *Reg. v. Hathaway*, 8 L. C. J. 285; *Reg. v. Carson*, 14 U. C. C. P. 309.

(n) 32 & 33 Vic., c. 19, s. 51.

It is also immaterial whether any person is actually defrauded by the forgery. (o) If, from circumstances, the jury can presume that it was the defendant's intention to defraud, it is sufficient to satisfy the allegation in the indictment, even though, from circumstances unknown to the defendant, he could not, in fact, defraud the prosecutor. (p)

The making of a false instrument is forgery, though it may be directed by statute that such instrument shall be in a certain form, which, in the instrument in question, may not have been complied with, the statute not making the informal instrument absolutely void, but it being available for some purposes. (q) Upon the same principle, a man may be convicted of forging an unstamped instrument, though such instrument can have no operation at law. (r)

But it seems that an indictment for forging a note or agreement, which is declared by law to be wholly void, cannot be maintained, if the instrument, on its face, affords evidence that it comes within the statute declaring it void. (s)

A false letter of recommendation, through the uttering of which to a chief constable the prisoner obtained a situation as constable, is the subject of forgery at common law. (t)

But a forgery must be of some document or writing; therefore, the painting of an artist's name in the corner of a picture, with the intention to pass it off as the original production of that artist, is not a forgery. (u) And where a bill, sent to a person without any drawer's name, for his acceptance, and the endorsement of a solvent third person, and returned with the acceptance and a fictitious endorsement, is

(o) *Reg. v. Crooke*, 2 Str. 901; *Reg. v. Goate*, 1 Ld. Raym. 737.

(p) *Reg. v. Holden*, R. & R. 154; *Reg. v. Marcus*, 2 C. & K. 356; *Reg. v. Hoatson*, *ibid.* 777.

(q) *Rex v. Lyons*, Russ & Ry. 255.

(r) *Rex v. Hawkenwood*, 1 Leach, 257; *Rex v. Lee*, *ibid.* 258 n.; *Taylor v. Golding*, 28 U. C. Q. B. 201, per *Richards*, C. J.

(s) *Taylor v. Golding*, 28 U. C. Q. B. 202, per *Richards*, C. J.

(t) *Reg. v. Moak*, 4 U. C. L. J. 240; *Dears. & B.* 550; 27 L. J. (M. C.) 204.

(u) *Reg. v. Oloss*, 4 U. C. L. J. 98; 1 *Dears. & B.* 460.

not a forgery of a negotiable security, though it might be a forgery at common law. (v)

An agreement in the following form :—

“GLANFORD, Jany. 29, 1864.

“ I, John Hostine, do agree to William Carson, of Warstead Plymp, the full right and privilege of all the white oak and elm and hickory lying and standing on lot 26, south part, on the third concession of Plymp, for the sum of thirty dollars, now paid to Hostine by Carson, the receipt whereof is hereby by me acknowledged.

“ JOHN HOSTINE ”

may be considered as a contract or agreement for the sale of timber, and parol evidence, of the surrounding circumstances, at the time it was written, would be admissible to explain it; and, at all events, should it fail as an agreement, it is clearly a receipt for the payment of money within the Con. Stats. Can., c. 94, s. 9. (w)

The prisoner was secretary of a friendly society, called the Ancient Order of Foresters, having branches in various towns. A member of this society, having paid up all his dues, wished to obtain a “clearance,” or certificate that he had made such payments, in order that he might be entitled to membership in a branch of the society in another town. The prisoner, having received the dues and fees for the clearance, neglected to pay them over to the proper officer, and forged the signature of the latter to a clearance; it was held that the clearance was not an acquittance or receipt for money within the corresponding English section of the 32 & 33 Vic., c. 19, s. 26. (x)

The prisoner was indicted under the Imperial 24 & 25 Vic., c. 98, s. 24, for feloniously making, by procuration, in the name of one A., a security for money, to wit, £417 13s., without lawful authority or excuse, with intent to defraud. The document forming the subject of the indictment was in the following form :—

(v) *Reg. v. Harper*, L. R. 7 Q. B. D. 78.

(w) *Reg. v. Carson*, 14 U. C. C. P. 309.

(x) *Reg. v. French*, L. R. 1 C. C. R. 217; 39 L. J. (M. C.) 58.

“ THORNTON, October, 1867.

“ Received of the South Lancashire Building Society the sum of four hundred and seventeen pounds 13s. on account of my share, No. 8071.

“ p. p. SUSY AMBLER.
WM. KAY.”

“ £417 13s.

It was held that this document, though in form a mere receipt, given by a depositor to the Building Society, might properly be described in an indictment as a “ warrant,” “ authority,” or “ request,” for the payment of money, if, by the custom of the society, such receipts were, in fact, treated as warrants, authorities and requests, for the payment of money. (y)

The 16th section of this statute, which is somewhat analogous to the 32 & 33 Vic., c. 19, ss. 19 and 20, extends to the engraving, in England, without authority, of notes purporting to be notes of a banking company, carrying on business in Scotland only, notwithstanding s. 65 enacts that nothing in the Act contained shall extend to Scotland. (z)

Upon an indictment under 1 Wm. IV., c. 66, s. 18, for engraving upon a plate part of a promissory note, purporting to be part of the note of a banking company, it was proved that the prisoner, having cut out the centre of a note of the British Linen Banking Company, on which the whole promissory note was written, had procured to be engraved upon a plate merely the Royal Arms of Scotland and the Britannia which formed part of the ornamental border, but placed upon the plate in the same manner as they are found in a complete note of the company. It was held that the plate so engraved satisfied the words of the section. That the ornamental border of such a note is part of the note within the section, as “ note ” is there used in the popular sense. That, in order

(y) *Reg. v. Kay*, L. R. 1 C. C. R. 257 ; 39 L. J. (M. C.) 118.

(z) *Reg. v. Brackenridge*, L. R. 1 C. C. R. 133 ; 37 L. J. (M. C.) 86.

to ascertain whether that which was engraved purported, within the section, to be part of a note, extrinsic evidence was admissible to the jury, and they might compare it with a genuine note of the company. (a)

An endorsement, "per procuration J. S.," signed in the defendant's own name, was held on the repealed statute, 11 Geo. IV., and 1 Wm. IV., c. 66, s. 3, not to be forgery, though the defendant falsely alleged that he had authority from J. S. to endorse. (b) It would however, be felony within the 31 & 32 Vic., c. 19, s. 27.

So, by s. 47 of this statute, the forgery of an instrument in this country, payable abroad, or the uttering of an instrument in this country, forged, and payable abroad, is made an offence within the meaning of the Act. (c)

When a prisoner, being pressed for payment of a debt, obtained further time to pay, by giving, as security, an I O U, in the following form:—

" NOVEMBER 21st, 1870.

" I O U thirty-five pounds (£35).

" ARTHUR CHAMBERS.

" GEORGE WICKHAM."

and purporting to be signed by the prisoner, and another whose signature was forged by the prisoner; it was held that this was an "undertaking for the payment of money" within 24 & 25 Vic., c. 98, s. 23, the corresponding English section of the 32 & 33 Vic., c. 19, s. 26. (d) And there being a consideration for the I O U, the fact that it did not appear was of no consequence; for the consideration of a guarantee need not be shown on its face. (e)

The following instrument was held to be a promissory note for the payment of money within s. 3, of the 10 & 11 Vic. c. 9:—

" The President, Directors and Co. of the Montreal Bank

(a) *Reg. v. Keith*, 1 U. C. L. J. 136; *Dears.* 486; 24 L. J. (M. C.) 110.

(b) *Reg. v. White*, 1 Den. 208; 2 C. & K. 404; *Arch. Cr. Pldg.* 579.

(c) See *Reg. v. Kirkwood*, 1 Mood. C. C. 311.

(d) *Reg. v. Chambers*, L. R. 1 C. C. R. 341.

(e) *Ibid.*; see 26 Vic., c. 45.

promise to pay five dollars, on demand, to W. Martin, or bearer.

“ A. SIMPSON, *Cashier*,
“ WM. GANN, *Pres.*

“ MONTREAL, June 1, 1853.”

for a forged paper, purporting to be a bank note, is a promissory note within the meaning of the statute, and it is equally so if there is no such bank as that named, the bank intended being erroneously described in the instrument. (*f*)

A country bank note for the payment of one guinea, “in cash or Bank of England notes,” was holden not to be “a promissory note for the payment of money” within the 2 Geo. II., c. 25, for it was necessary that such a note should be for the payment of money only. (*g*) Such a case is now provided for by the 32 & 33 Vic., c. 19, s. 15.

Under s. 26, the forgery of a request for the payment of money is made felony, though it was formerly no offence. (*h*)

A forged magistrate’s order for a reward for apprehending a vagrant, which appeared upon the face of it to be defective, as not being under seal or directed to the constable, etc., was holden not to be within the former statute ; for, without these requisites, it was nothing more than the order of a mere individual, which the treasurer was not bound to obey. (*i*) Such orders would be authorities or requests within the above section.

An instrument in the following form :—

“ \$3.50.

CARRICK, April 10, 1863.

“ JOHN MCLEAN, tailor, please give Mr. A. Steel to the amount of three dollars and fifty cents, and by doing you will oblige me.

“ (Signed) ANGUS MCPHAIL.”

is an order for the payment of money, and not a mere request. (*j*) But an instrument as follows :—

(*f*) *Reg. v. McDonald*, 12 U. C. Q. B. 543.

(*g*) *Reg. v. Wilcock*, 2 Russ. 498 ; Arch. Cr. Pldg. 579.

(*h*) See *Reg. v. Thorn*, 2 Mood. C. C. 210 ; C. & Mar. 206.

(*i*) *Reg. v. Rushworth*, R. & B. 317 ; Arch. Cr. Pldg. 583.

(*j*) *Reg. v. Steel*, 13 U. C. C. P. 619.

“ RENFREW, June 13, 1860.

“ MR. MCKAY,—Sir, would you be good enough as for to let me have the loan of \$10 for one week or so, and send it, by the bearer immediately, and much oblige your most humble servant,

“ (Signed), J. ALMIRAS, p.p.”

was held not an order for the payment of money, within the Con. Stats. Can., c. 94, but a mere request. (*k*)

“ MR. WARREN,—Please let the bearer, William Tuke, have the amount of ten pounds, and you will oblige me,

“ B. B. MITCHELL,”

is an order for the payment of money, within this statute, and not a mere request; (*l*) but it would not be a warrant for the payment of money, within the meaning of the statute. (*m*) The true criterion as to the instrument being an order or not, is, whether the person to whom it is directed could recover the amount on payment. (*n*)

A writing not addressed to a particular person by name, or to anyone, may be an order for the payment of money, within the statute, if it be shown by evidence that it was intended for such person, or for whom it was intended. (*o*)

Thus where the order was for \$15, in favor of “ bearer or R. R.” and purported to be signed by one “ B,” and the prisoner in person presented it to M., representing himself to be the payee and a creditor of “ B:” it was held that it might fairly be inferred to be intended for M., and a conviction for forgery was sustained. (*p*)

An indictment will not lie for forging or altering the

(*k*) *Reg. v. Reopelle*, 20 U. C. Q. B. 260.

(*l*) *Reg. v. Tuke*, 17 U. C. Q. B. 298.

(*m*) *Ibid.* 298, per *Robinson*, C. J.

(*n*) *Ibid.* 299, per *Robinson*, C. J.; *Reg. v. Carter*, 1 Cox, C. C. 172; *ibid.* 241; *Reg. v. Dawson*, 3 Cox, C. C. 220.

(*o*) *Reg. v. Parker*, 15 U. C. C. P. 15; *Reg. v. Snelling*, 6 Cox, 230; 1 Dears. 219.

(*p*) *Reg. v. Parker*, 15 U. C. C. P. 15; *Reg. v. Snelling*, 6 Cox, 230; 1 Dears. 219.

Assessment Roll for a township, deposited with the clerk. (q)
This would probably now be an offence within the 32 & 33 Vic., c. 19.

An indictment for forgery of a note was held defective, in not stating expressly that the note was forged, or that the defendant uttered it as true. (r)

Until the provincial statute, 9 Vic., c. 3, the old rule of the criminal law of England prevailed, that the party by whom a forged instrument purported to be signed, was not competent to prove the signature to be forged, and any one who might, by possibility, receive the remotest advantage from the verdict was equally excluded. But the objection was founded on the ground of interest, and, if the witness were divested of such interest, he became competent. (s)

The 10 & 11 Vic., c. 9, re-enacted the provisions of the 9 Vic., c. 3, and the 16 Vic., c. 19, Con. Stats. U. C., c. 32, removed the incapacity of crime or interest. This latter statute did not supersede the former, and both are founded on the same principle, namely, to prevent the exclusion of witnesses, on the ground of interest in the subject-matter of inquiry, the first being applicable to inquiries relative to forgery, the latter, general, and also removing the disqualification attached to a conviction for crime. (t)

The 32 & 33 Vic., c. 19, s. 54, and c. 29, s. 62, now embody all the provisions of the former enactments on these points.

Where the prisoner was indicted for forging an order for the delivery of goods, and on the trial the only witnesses examined were the person whose name was forged and the person to whom the order was addressed, and who delivered the goods thereon, and, there being no corroborative evidence, it was held, that, under the proviso in the 10 & 11 Vic., c.

(q) *Reg. v. Preston*, 21 U. C. Q. B. 86.

(r) *Reg. v. Dunlop*, 15 U. C. Q. B. 118.

(s) *Reg. v. Giles*, 6 U. C. C. P. 86, per *Draper*, C. J.

(t) *Ibid.* 86, per *Draper*, C. J.

9, s. 21, there was not sufficient evidence to support a conviction. (u)

Where, on an indictment for forgery of the prosecutor's name as endorser of a promissory note, the prosecutor swore that he was a marksman, and had on several occasions endorsed notes for the prisoner, sometimes allowing the prisoner to write his name, and sometimes making his mark, and the only evidence offered in corroboration was that of the prosecutor's son, to the effect that his father was a marksman; it was held (v) that such corroboration was sufficient to warrant a conviction. (w) But the court were not unanimous in their decision, and the authority of the case may well be doubted. Furthermore, it has been held in Quebec, that the corroboration of the evidence of an interested witness cannot be based on something stated by that witness. (x)

The offence of forgery is not triable at the Quarter Sessions. (y)

Great care was formerly requisite in describing the instrument in an indictment for forgery, but now it is sufficient to describe the same by any name or designation, by which the same may be usually known, or by the purport thereof, without setting out any copy or *fac simile* thereof, or otherwise describing the same or the value thereof. (z)

It is not necessary, in an indictment for forgery, to allege an intent to defraud any particular person, but it is sufficient to allege that the party accused did the act with intent to defraud. (a)

Where goods were obtained by false pretences, through the medium of a forged order, the uttering of which was felony, the indictment must formerly have been for the felony,

(u) *Reg. v. Giles*, 6 U. C. C. P. 84. As to what is sufficient corroboration, see *Reg. v. McDonald*, 31 U. C. Q. B. 337.

(v) *Cameron*, J. dissenting.

(w) *Reg. v. Bannerman*, 43 U. C. Q. B. 547.

(x) *Reg. v. Perry*, 1 L. C. L. J. 60.

(y) *Reg. v. McDonald*, 31 U. C. Q. B. 337; *Reg. v. Dunlop*, 15 U. C. Q. B. 118.

(z) 32 & 33 Vic., c. 19, s. 49.

(a) See s. 51.

otherwise an acquittal would have been directed on the ground that the misdemeanor was merged. (b)

In an indictment for forging a receipt, it must be alleged that such receipt was either for money or goods, etc., as mentioned in the Con. Stats. Can., c. 94, s. 9. (c)

Where the instrument is set out in *hæc verba*, in an indictment for forgery, the description of its legal character is surplusage, and unnecessary. (d)

It is no defence to an indictment for forging a note, that the prisoner may have expected, and fully intended, to pay it when it became due. (e)

The offence of forgery, at common law, was only a misdemeanor, and it fell within the general class of cheats. (f)

Cheats and frauds.—These offences at common law consisted in the fraudulent obtaining the property of another, by any deceitful and illegal practice or token, short of felony, which affects, or may affect, the public, or such frauds as are levelled against the public justice of the realm. (g) But every fraud on private individuals is not a penal offence. (h)

In the case of forgery, it was sufficient that the party might be prejudiced by the false instrument, but nothing could be prosecuted as a cheat at common law without an actual prejudice, which was an obtaining on the statute 33 Hy. VIII. (i)

If a person, in the way of his trade or business, put, or suffer to be put, a false mark or token upon any article, so as to pass off as genuine that which is spurious, if such article be sold by such false token or mark, the person so selling may be indicted for a cheat at common law, but the indictment must allege that the article was passed off by means of such false token or mark.

(b) *Reg. v. Evans*, 5 C. & P. 553; but see now 32 & 33 Vic., c. 29, s. 50.

(c) *Reg. v. McCorkill*, 8 L. C. J. 283.

(d) *Reg. v. Carson*, 14 U. C. C. P. 309; *Reg. v. Williams*, 2 Den. C. C. 61.

(e) *Reg. v. Craig*, 7 U. C. C. P. 244.

(f) 2 Russ. Cr. 709 *et seq.*

(g) *Reg. v. Roy*, 11 L. C. J. 94, per *Drummond, J.*; and see 2 Russ. Cr. 613.

(h) *Reg. v. Roy*, 11 L. C. J. 89.

(i) 2 Russ. Cr. 613; *Ward's case*, 2 Str. 747.

Where an indictment alleged that the prisoner, being a picture dealer, knowingly kept in his shop a picture whereon the name of an artist was falsely and fraudulently painted, with intent to pass the picture off as the original work of the artist whose name was so painted, and that he sold the same to H. F., with intent to defraud, and did thereby defraud him, but without stating that the picture was passed off by means of the artist's name being so falsely painted, it was held that such painting of the artist's name was putting a false token on the picture, and that the selling by means thereof would be a cheat at common law, but that the want of such last averment was fatal. (*j*)

Where a person contracts to deliver loaves of bread, of a certain weight, at a certain price, the delivery of a less quantity (*i. e.*, less in weight) than that contracted for, is a mere private fraud, and not indictable, if no false weights or tokens have been used. (*k*)

False personation.—Falsely personating a voter at a municipal election is not an indictable offence. Our statute law contains no provision on the subject, nor is it an offence at common law. (*l*) It is different, however, with regard to parliamentary elections, for by 37 Vic., c. 9, s. 74, it is enacted that "a person shall, for all purposes of the laws relating to parliamentary elections, be deemed to be guilty of the offence of personation, who, at an election of a member of the House of Commons, applies for a ballot paper in the name of some other person, whether such other name be that of a person living or dead, or of a fictitious person, or who having voted once at any such election, applies at the same election for a ballot paper in his own name."

To complete the offence of inducing a person to personate a voter, it would seem not necessary that the personation should be successful, and a conviction for the offence was

(*j*) *Reg. v. Closs*, 4 U. C. L. J. 98; *Dears. & B.* 460; 27 L. J. (M. C.) 54.

(*k*) *Reg. v. Eagleton*, 1 U. C. L. J. 179; *Dears.* 515; 24 L. J. (M. C.) 158.

(*l*) *Reg. v. Hogg*, 25 U. C. Q. B. 66; *Reg. v. Dent*, 1 Den. C. C. 159.

held good, though it did not set out the mode or facts of the inducement. (*m*)

It would seem that in an indictment for this offence there should be an averment negating the identity of the defendant with the voter suggested to be personated. (*n*)

Malicious injuries.—Injuring or destroying private property is, in general, no crime, but a mere civil trespass, over which a magistrate has no jurisdiction, unless by statute. (*o*)

The 32 & 33 Vic., c. 22, contains provisions respecting malicious injury to property; but, to bring a case within this statute, the act must have been wilfully or maliciously done. (*p*) But the malice, to be proved, need not have been conceived against the owner of the property, in respect of which it shall be committed. (*q*) And where a man does an act to an animal which he knows may prove fatal, not from ill-will towards the owner or animal, but simply to gratify his depraved tastes, such act is malicious within the statute. (*r*) But where the prisoner threw a stone at a crowd intending to hit one or more of them, but not intending to injure the window, it was held that there was no malice, actual or constructive. (*s*) On principle, one would have thought that the malice would have been transferred to the window.

It would seem to be necessary to allege that the property injured is the property of another person. (*t*)

It is not necessary that the damage done should be of a permanent kind. Plugging up the feed pipe of a steam engine is an offence within s. 19 of this Act. (*u*)

It was held under the former statute, 4 & 5 Vic., c. 26, s. 5, the words of which were not so comprehensive as the

(*m*) *Reg. v. Hague*, 12 W. R. 310.

(*n*) *Reg. v. Hogg*, 25 U. C. Q. B. 68, per *Haggarty*, J.

(*o*) *Powell v. Williamson*, 1 U. C. Q. B. 155, per *Robinson*, C. J.

(*p*) *Powell v. Williamson*, *supra*; *Reg. v. Elston*, 5 All. 2.

(*q*) See 66; *Reg. v. Bradshaw*, 38 U. C. Q. B. 584; *Reg. v. Elston*, 5 All. 2.

(*r*) *Reg. v. Welch*, L. R. 1 Q. B. D. 23.

(*s*) *Reg. v. Pembleton*, L. R. 2 C. C. R. 119.

(*t*) *Reg. v. Elston*, 5 All. 2.

(*u*) *Reg. v. Fisher*, L. R. 1 C. C. R. 7; 35 L. J. (M. C.) 57.

present statute, that an apparatus for manufacturing potash, consisting of ovens, kettles, tubs, etc., was not a machine or engine, the cutting, breaking, or damaging of which was felonious. (v)

If the defendant sets up and shows a *bona fide* claim of title to land, the jurisdiction of the magistrate is ousted, (w) even though he believe the claim to be ill-founded. (x)

Under s. 45 of the 32 & 33 Vic., c. 22, upon an indictment for maliciously wounding a horse, it is not necessary to prove that any instrument was used to inflict the wound, and the word "wound" must be taken in the ordinary sense. (y)

Secs. 20 and 28 of the 4 & 5 Vic., c. 26, gave a summary remedy, not for trespassing on the close, but for malicious injuries to the tree. (z)

A summons for malicious injury to property, under the former statute, must have been upon complaint under oath, and a conviction stating that the offence complained of was committed "*depuis environ huit jours*," was held bad for uncertainty. (a)

The offence of wilfully injuring a fence, etc., under the (N.B.) 1 Rev. Stats., c. 153, s. 11, was a misdemeanor, not punishable by summary conviction. (b)

An indictment charging that the defendant in a secret and clandestine manner cut off the hair from the manes of two horses, the property of one W. B., discloses an offence within the Rev. Stats. of Nova Scotia, c. 169, s. 22; and where an act is committed wrongfully and intentionally, and with full knowledge of the ownership of the property, malice will be presumed. (c)

(v) *Reg. v. Dugherty*, 2 L. C. R. 255.

(w) *Reg. v. O'Brien*, 5 Que. L. R. 161; *ex parte Donovan*, 2 Pugsley, 389; *Reg. v. Taylor*, 8 U. C. Q. B. 257.

(x) *Reg. v. Davidson*, 45 U. C. Q. B. 91.

(y) *Reg. v. Bullock*, L. R. 1 C. C. R. 115; 37 L. J. (M. C.) 47.

(z) *Madden v. Farley*, 6 U. C. Q. B. 213, per *Robinson*, C. J.

(a) *Ex parte Hook*, 3 L. C. R. 496.

(b) *Ex parte Mulhern*, 4 Allen, 259.

(c) *Reg. v. Smith*, 1 Sup. C. R. (N. S.) 29.

Arson.—Arson at common law is an offence of the degree of felony, and has been described as the malicious and wilful burning of the house of another. (d) It is to be observed that the burning must be of the house of another, but the burning a man's own house in a town, or so near to other houses as to create danger to them, is a great misdemeanor at common law. (e)

The owner of a house would, at common law, commit no offence by destroying it, whether by fire or by pulling it down to the ground, provided that in so doing he did not infringe the maxim, *sic utere tuo ut alienum non lædas*, and even by non-observance of that rule he would only commit a civil injury, and not a crime. (f)

Arson, at common law, being an injury to the actual possession, and not merely a wrong in destroying a valuable property, when the legislature extends the limits of the crime, we must construe its enactments strictly. (g)

By the 32 & 33 Vic., c. 22, s. 3, the setting fire to any house, whether the same is then in the possession of the offender or in the possession of any other person, is made felony; and now, under this statute, it is immaterial whether the house be that of another or of the defendant himself.

The words in this statute are "set fire to" merely, and therefore, it is not necessary to aver in the indictment that the house, etc., was burnt, nor is proof required that it was actually consumed. (h) But within this Act, as well as to constitute the offence of arson at common law, there must be an actual burning of some part of the house; a bare intent or attempt to do it is not sufficient. (i)

Where a small faggot, having been set on fire on the boarded floor of a room, the boards were thereby "scorched black but not burnt," and no part of the wood was con-

(d) 2 Russ. C. R. 1024.

(e) *Ibid.*

(f) *Reg. v. Bryans*, 12 U. C. C. P. 163-4, per *Draper*, C. J.

(g) *McNab v. McGrath*, 5 U. C. Q. B. O. S. 522, per *Robinson*, C. J.

(h) *Reg. v. Salmon*, R. & R. 26; *Reg. v. Stallion*, 1 Mood. C. C. 398; Arch. Cr. Pldg. 509.

(i) *Ibid.*

sumed, this was held not a sufficient burning. (j) Now, however, by s. 8 of the statute, setting fire to any matter or thing, being in, against, or under any building, under such circumstances, that if the building were thereby set fire to, the offence would amount to felony, is made felony.

Setting fire to a quantity of straw on a lorry is not an offence within the Act. (k) The burning must also be malicious and wilful, otherwise it is only a trespass. And an information simply saying that the prosecutor believed that the prisoner had set fire to the prosecutor's premises, was held to disclose no offence. (l) No negligence or mischance, therefore, will amount to such a burning. (m) But malice against the owner of the property is not necessary. (n)

The decisions with respect to burglary apply also to arson, as to what may be considered a house, shop, etc. (o)

A shop is defined to be a place where things are publicly sold. It also has another signification, as a room where some kind of manufactures are carried on, as a shoemaker's shop, etc.; but this sense is merely confined to common speech, and the legislature does not generally use the word in this sense; and in the 3 Wm. IV., c. 3, they clearly did not, because buildings used in carrying on any trade or manufacture were protected under a separate and distinct provision, although the term shop had been used before, and, in fact, by their adding the qualification used, in carrying on any trade or manufacture, the legislature evinced that they intended to have reference to the purpose for which the building was actually used, at the time of the offence. (p)

Where a building set fire to had not, for a year or more, been occupied as a shop, but contained some iron in the cellar, but was otherwise not inhabited for any purpose; it

(j) *Reg. v. Russell*, C. & Mar. 541.

(k) *Reg. v. Satchwell*, L. R. 2 C. C. R. 21.

(l) *Munro v. Abbot*, 39 U. C. Q. B. 78.

(m) 2 Russ. Cr. 1025.

(n) 32 & 33 Vic., c. 22, s. 66; *Reg. v. Bradshaw*, 38 U. C. Q. B. 564.

(o) *McNab v. McGrath*, 5 U. C. Q. B. O. S. 522.

(p) *Ibid.*, *supra*, 520.

was held not to be a shop within the meaning of the statute. (q)

It was clearly not the intention of the legislature to make the burning of any and every building arson, and the reason which may have led to including dwelling-houses, barns, or shops, can only be intended to apply to buildings occupied as dwelling houses, barns, or shops. Not that a dwelling-house, etc., can only be regarded as being legally such at the very moment when it is actually being used for its appropriate purpose. If left for a moment *animo revertendi*, it is still the dwelling-house of its possessor. A mere building, though fitted up, or intended for any of these purposes, does not acquire its character until it has been appropriated to its proper purpose, and, after it has been so appropriated, the use must be continued to the time of the offence, or, if discontinued, must be discontinued under such circumstances as indicate an intended immediate resumption. (r)

A small shanty, about twelve feet square, slightly constructed with boards placed upright, having a shed-roof of boards but no floor, nor any windows or openings for windows, having, however, a door not hung but fastened with nails, being used by a carpenter who was putting up a house near it, as a place of deposit for his tools and window-frames which he had made, but in which no work was carried on by him, and which had not been used as a workshop at any time, to any degree, was held not a building used in carrying on the trade of a carpenter, within the 4 & 5 Vic., c. 26, s. 3. (s)

A building, within the 32 & 33 Vic., c. 22, s. 7, need not necessarily be a completed or finished structure: it is sufficient that it should be a connected and entire structure.

Thus in one case, the building set fire to was one of seven built in a row, intended for dwelling-houses, and built, in part, of machine-made bricks, all the walls, external and

(q) *McNab v. McGrath*, 5 U. C. Q. B. O. S. 519.

(r) *Ibid.* 522.

(s) *Reg. v. Smith*, 14 U. C. Q. B. 546.

internal, of the house, being built and finished, the roof being on and finished, and a considerable part of the flooring laid. The internal walls and ceiling were prepared, and ready for plastering, and the house was in a forward state towards completion, but was not completed; it was held to be a building within the meaning of this section. (t)

But the remains of a wooden dwelling-house after a previous fire, which left only a few rafters of the roof and injured the sides and floors so as to render it untenable, and which was being repaired, was held to be no "building" within the section. (u)

Where the question of building or no building is properly left to the jury, their finding is conclusive. (v)

Where the offence consists of the setting fire to the house of a third person, the intent to injure that person is inferred from the act, provided it be wilful, for every person is deemed to intend the natural consequences of his own act. (w)

On the other hand, where the defendant is charged with setting fire to his own house, the intent to defraud cannot be inferred from the act itself, but must be proved by other evidence. (x)

An indictment, under Con. Stat., c. 93, s. 4, need not have alleged the intent to injure or defraud, as the statute did not make the intent part of the crime, and differed from the English in this respect. (y) But it was necessary to prove an intent to injure or defraud, in order to show the act to be unlawful and malicious within the meaning of the statute, (z) when the court would infer the act to be unlawful and malicious. (a)

The 32 & 33 Vic., c. 22, s. 3, makes the intent part of the

(t) *Reg. v. Manning*, L. R. 1 C. C. R. 338.

(u) *Reg. v. Labadie*, 32 U. C. Q. B. 429.

(v) *Reg. v. Manning*, L. R. 1 C. C. R. 338.

(w) See *Reg. v. Farrington*, R. & R. 207.

(x) See Arch. Cr. Pldg. 511-12; *Reg. v. Gilson*, R. & R. 138.

(y) *Reg. v. Bryans*, *supra*; *Reg. v. Greenwood*, 23 U. C. Q. B. 250.

(z) *Reg. v. Bryans*, 12 U. C. C. P. 161.

(a) *Ibid.*

crime, and it is apprehended that the intent must now be alleged in the indictment, notwithstanding the above cases. (b)

In *Greenwood's case*, the prisoner being indicted for unlawfully and maliciously attempting to burn his own house, by setting fire to a bed in it, it appeared in evidence that the house in question was so closely adjoining to another house, both being of wood, and the space between the two being only a few inches, that it would be next to impossible that the one should be burnt without also burning the other; that the dead body of a woman was in the bed at the time; that her death had been caused by violence; that she had been recently delivered of a child, whose body was found in the kitchen, and that she had lived in the house since it had been rented by the prisoner, who frequently went there at night. It was also shown that the prisoner had been indicted for the murder of this woman, and acquitted, and the record of his acquittal was put in. This evidence was objected to, as tending to prejudice the prisoner's case; but the court held it admissible, for, the house being the prisoner's, it was necessary to show that his attempt to set fire to it was unlawful and malicious, and that these facts would prove it, and might also satisfy the jury that, the murder being committed by another, the prisoner's act was intended to conceal it. (c)

The intention must be to injure some person who is not identified with the defendant. Therefore, a married woman cannot be indicted for setting fire to the house of her husband, with intent to injure him. (d)

Where the prisoners are indicted under the 32 & 33 Vic., c. 22, s. 3, for unlawfully, maliciously, and feloniously setting fire to a shop "of and belonging to" one of the prisoners, the averment of ownership is an immaterial averment, which may be rejected as surplusage, and need not be proved;

(b) See Arch. Cr. Pldg. 508; *Reg. v. Price*, 1 C. & K. 73; but see *Reg. v. Cronin*, Rob. & J. Dig. 904.

(c) 23 U. C. Q. B. 250.

(d) *Reg. v. March*, 1 Mood. C. C. 182; Arch. Cr. Pldg. 512.

and an intent to injure another person, whose name is not stated in the indictment, may be proved in support of the indictment; for, by s. 68 of the Act, it is not necessary to allege an intent to injure or defraud any particular person. (e)

The word "arson" is not used as a term of art, as "murder," or the like, in legal documents; but is used to express what indictments describe as wilfully, maliciously, and feloniously setting fire to a house. (f)

Where one W., after arranging against a wall, under the prisoner's directions, a blanket saturated with coal oil, so that if a flame were communicated to it, the building would have caught fire, lighted a match, and held it in his fingers till it was burning well, and then put it down towards the blanket, and got it within an inch or two of the blanket, when the match went out, the blaze not touching the blanket, and he throwing away the match, and leaving, without making any second attempt, and no fire was actually communicated to the oil or blanket; it was held that these were overt acts immediately and directly tending to the execution of the principal crime, and that the prisoner was properly convicted under the 32 & 33 Vic., c. 22, s. 12, of an attempt to commit arson. (g)

On an indictment under the corresponding English section of 32 & 33 Vic., c. 22, s. 8, it appeared that the prisoner, from ill-will and malice against a person lodging in a house, made a pile of her goods on the stone floor of the kitchen, and set fire to them, under such circumstances that the house would almost certainly have been burned, had not the police extinguished the fire before the house was actually ignited. The judge, at the trial, told the jury that, if the house had caught fire from the burning goods, the question whether the offence would have amounted to felony would have depended upon whether such a setting fire to the house would have been malicious, and with intent to injure, so as to bring the case

(e) *Reg. v. Newbould*, L. R. 1 C. C. R. 344.

(f) *Re Anderson*, 11 U. C. C. P. 69, per *Hagarty*, J.

(g) *Reg. v. Goodman*, 22 U. C. C. P. 338.

within the corresponding section of 32 & 33 Vic., c. 22, s. 3 ; and that, though the prisoner's object was only to destroy the goods, and injure the owner of them, and not to destroy the house, or injure the landlord, yet, if they thought he was aware that what he was doing would probably set the house on fire, and so necessarily injure the owner, and was at best reckless whether it did so or not, they ought to find that, if the building had caught fire, from the setting fire to the goods, the offence would have been felony, otherwise not. The jury found that the prisoner was guilty, but not so that, if the house had caught fire, the setting fire to the house would have been wilful and malicious ; and it was held that, upon the finding of the jury, the prisoner was not guilty of felony ; for their finding was only that the goods were set on fire with intent to injure the owner of the goods, and there was no section in the Act which makes the wilful and malicious setting fire to goods felony. (i)

It is a felony, under 14 & 15 Vic., c. 19, s. 8, coupled with 7 Wm. IV., and 1 Vic., c. 89, s. 3, for a man to set fire to goods in a house in his own occupation, with intent to defraud an insurance company, by burning the goods. One of these Acts makes it felony to set fire to a house, with intent to defraud. The other, felony to set fire to goods in a house, the setting fire to which house would be felony. If the intention to defraud is meant to extend to the defrauding of any person who may be defrauded by the effects in the house being destroyed, then, in this case, it would be felony to set fire to the house ; but setting fire to goods in a house, the setting fire to which house would be felony, is felony. (j)

Upon an indictment under 7 Wm. IV., and 1 Vic., c. 89, s. 10, for setting fire to a stack of grain, it was proved that the prisoner set fire to a stack of flax, with the seed in it, and the jury found that flax seed is grain, and it was held that a conviction was right. (k)

(i) *Reg. v. Child*, L. R. 1 C. C. R. 307.

(j) *Reg. v. Lyons*, 5 U. C. L. J. 70 ; *Ball*, C. C. 38.

(k) *Reg. v. Spencer*, 3 U. C. L. J. 19 ; *Dears. & B.* 131 ; 26 L. J. (M.C.) 16.

Perjury and subornation of perjury.—Perjury at common law is defined to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely, in a matter of some consequence, to the point in question, whether he be believed or not. (l) Subornation of perjury, by the common law, is an offence, in procuring a man to take a false oath, amounting to perjury, who actually takes such oath. (m) These offences are now misdemeanors, by the 32 & 33 Vic., c. 23. s. 1.

An oath or affirmation, to amount to perjury, must be taken in a judicial proceeding, before a competent jurisdiction. (n)

The swearing falsely by a voter, at an election of aldermen, is not an oath upon which, by the common law, perjury could be assigned, not being in any judicial proceeding, or anything tending to render effectual a judicial proceeding. (o) This would probably now be perjury, under the 32 & 33 Vic., c. 23, s. 2. (p)

But false swearing before a local marine board, lawfully constituted, upon a matter material to an inquiry, then being lawfully investigated by them, in pursuance of the 17 & 18 Vic., c. 104, is perjury and indictable, as such, for it is in a tribunal invested with judicial powers. (q)

Since the Judicature Act, it is sufficient evidence of the existence of proceedings for the officer of the court to produce the copy of the writ filed, and of the pleadings, if any. (r)

Although a summons in bastardy is irregularly issued, yet, if the defendant actually appears, he thereby waives any irregularity there might be in the process; consequently the proceeding of the justices, in taking his evidence, is a

(l) 3 Russ. Cr. 1.

(m) *Ibid.*

(n) *Reg. v. Aylett*, 1 T. R. 69; 3 Russ. Cr. 2.

(o) *Thomas v. Platt*, 1 U. C. Q. B. 217.

(p) *Hogle v. Hogle*, 16 U. C. Q. B. 520, per *Robinson*, C. J.

(q) *Reg. v. Tomlinson*, L. R. 1 C. C. R. 49; 36 L. J. (M. C.) 41; *Reg. v. Smith*, L. R. 1 C. C. R. 110.

(r) *Reg. v. Scott*, L. R. 2 Q. B. D. 415.

valid judicial proceeding sufficient to make the prisoner's false swearing, in the course of it, perjury. (s)

Where the affidavit is not taken in a judicial proceeding, and therefore does not constitute perjury in its strict sense, the party may nevertheless be indicted for a misdemeanor at common law if taken on a lawful occasion, in which it has been made an offence by law to swear falsely. (t) Thus a false statement in an affidavit made under the Bills of Sale Act, for the purpose of having a bill of sale filed, though not strictly constituting perjury, was, nevertheless, a false oath, sufficient to found a conviction for perjury on the ordinary indictment. (u)

The party administering the oath must have competent authority to administer it in the particular proceeding in which the witness is sworn. (v)

To give a magistrate jurisdiction, it is unnecessary to show any summons issued, or any step taken to bring the person complained of before him, for, so long as he was present, the manner of his getting there was immaterial; (w) and even the fact that he was arrested on a warrant illegally issued does not affect the magistrate's jurisdiction. (x)

But where the complaint before the magistrate was for selling liquor without license, contrary to the (Ont.) 32 Vic, c. 32, and the indictment did not show where the liquor was sold, and s. 25 of the Act required the proceedings to be carried on before magistrates "having jurisdiction in the municipality in which the offence is committed," so that it did not appear from the indictment that the magistrate had jurisdiction to hear the complaint or administer the oath, the indictment was held insufficient in law. (y)

(s) *Reg v. Fletcher*, L. R. 1 C. C. R. 320.

(t) *Reg. v. Chapman*, 1 Den. 432, 2 C. & K. 846; *Reg. v. Hodgkiss*, L. R. 1 C. C. R. 212; 39 L. J. (M. C.) 14; *Hogle v. Hogle*, *supra*.

(u) *Reg. v. Hodgkiss*, L. R. 1 C. C. R. 212.

(v) *Reg. v. McIntosh*, 1 Hannay, 372; *McAdam v. Weaver*, 2 Kerr, 176.

(w) *Reg. v. Mason*, 29 U. C. Q. B. 431.

(x) *Reg. v. Hughes*, L. R. 4 Q. B. D. 614.

(y) *Reg v. Mason*, 29 U. C. Q. B. 434, per *Wilson*, J.

Defendant, by verbal agreement, engaged to work as a farm servant with one T., on the 9th of April, 1860, at \$8 per month, the bargain being, that he should work for half a month, and as long after as he was found to suit, or until the fall ploughing was done. It was held that this could not be treated as a hiring for a year, or any period beyond it, and that it was such a hiring as came within the Con. Stats. U. C., c. 75, and under the 12th section of the Act, gave the magistrate jurisdiction to adjudicate on the matter, and afford redress, and that a false oath taken in such proceeding was therefore perjury. (z) A magistrate has jurisdiction to adjudicate upon such a complaint, although the summons be not taken out until the relation of master and servant has ceased; or, at any rate, he has jurisdiction to inquire into the existence of that relation. (a)

But where a woman, having obtained judgment against the defendant in a county court, married, and afterwards, in her maiden name, took out a judgment summons against him in another district, which, on hearing, the judge amended by inserting her husband's name, and the defendant was then sworn and examined, and was afterwards indicted and convicted at that hearing; it was held that he was improperly convicted, as he had been sworn in a cause in which there was no judgment, and in which the county court had no jurisdiction; (b) and on an information for unlawfully killing cattle, the charge was held to be only one of trespass, and that, therefore, the magistrate had no jurisdiction to administer an oath. (c)

The defendant was convicted on an indictment for perjury, assigned upon a clause in his affidavit, made before a magistrate under Con. Stat. U. C., c. 52, s. 73, in compliance with one of the conditions of a policy issued to him by a mutual fire insurance company, requiring the assured, in case of loss

(z) *Reg. v. Walker*, 21 U. C. Q. B. 34.

(a) *Reg. v. Proud*, L. R. 1 C. C. R. 71.

(b) *Reg. v. Pearce* 9 U. C. L. J. 333; 3 B. & S. 531; 32 L. J. (M. C.) 75

(c) *Ganong v. Fawcett*, 2 Pugsley, 129.

by fire, to deliver unto the company a detailed statement, under oath, of his loss, and value of the property destroyed. It was held that the policy of insurance containing this condition should have been produced in order to show the authority of the justice of the peace, before whom the affidavit was made, to administer the oath, and also the condition above referred to, of which there had been no proof whatever, although the perjury assigned had been committed in complying with it. (d)

By the 32 & 33 Vic., c. 23, s. 4, the justice or commissioner is now required to take the affidavit or declaration.

On an indictment for perjury, on the hearing of a complaint for trespass in pursuit of game, it appeared that the complaint alleged that the defendant was in the close for the purpose of destroying game, but it did not allege that it was for the purpose of destroying game there. The complaint was held to be sufficient in form to give the justices jurisdiction, so as to make false evidence, on the hearing, perjury. (e)

The clerk of a Division Court, acting under the 13 & 14 Vic., c. 53, s. 102, issued an interpleader summons on his own authority, without the bailiff's request. The statute requires the summons to be issued upon the application of the officer charged with the execution of the process. Both parties attended before a barrister appointed by the judge of the court, who was ill. They thereby submitted to the jurisdiction, and an order was made under this section. The judge afterwards granted a new trial, which took place. The defendant was convicted of perjury, committed on the hearing, after the granting of the new trial; but it was held that both parties having appeared in the first instance, the proceedings then could not be considered void, for want of a previous application by the bailiff, and were, consequently, final and conclusive. But it not being competent to the judge to order a new trial, under s. 84 of this Act, the pro-

(d) *Reg. v. Gagan*, 17 U. C. C. P. 530.

(e) *Reg. v. Western*, L. R. 1 C. C. R. 122; 37 L. J. (M. C.) 81.

ceedings on the second trial were irregular and extra-judicial, and the false swearing taking place on it, the conviction was illegal, as there was no authority to administer the oath. (*f*)

Not only must offences of the nature charged be within the competence of the magistrate, but he must also have jurisdiction territorially. (*g*)

Where the jurat of an affidavit states the place, it is *prima facie* evidence of administering the oath there. (*h*) A person is indictable who gives false evidence before a grand jury, on a bill of indictment, and the false swearing may be proved by the evidence of other witnesses, examined before them on the same bill (*i*)

Previously to the 32 & 33 Vic., c. 23, s. 7. the doctrine was, that that part of the oath upon which the perjury is assigned must be material to the matter then under the consideration of the court. (*j*)

But that section enacts that all evidence and proof whatsoever, whether given or made orally, or by, or in any affidavit, affirmation, declaration, examination or deposition, shall be deemed and taken to be material, with respect to the liability of any person to be proceeded against, and punished for wilful and corrupt perjury, or for subornation of perjury.

The matter sworn must be either false in fact or, if true, the defendant must not have known it to be so. But a man may be indicted for perjury, in swearing that he believes a fact to be true, which he must know to be false. (*k*)

(*f*) *Reg. v. Doty*, 13 U. C. Q. B. 398.

(*g*) *Reg. v. Row*, 14 U. C. C. P. 307; *Reg. v. Atkinson*, 17 U.C.C.P. 295.

(*h*) *Reg. v. Atkinson*, *supra*, 301, per *J. Wilson, J.*

(*i*) *Reg. v. Hughes*, 1 C. & K. 519; Arch. Cr. Pldg. 815.

(*j*) *Reg. v. Griep*, 1 Ld. Raym. 256; *Reg. v. Nichol*, 1 B. & Ald. 21; *Reg. v. Townsend*, 10 Cox, 356; 4 F. & F. 1089; Arch. Cr. Pldg. 816; 2 Salk. 514; *Reg. v. Lavey*, 3 C. & K. 26; *Reg. v. Overton*, 2 Mood. C. C. 263; C. & Mar. 655; see also *Reg. v. Gibbons*, L. & C. 109; 31 L. J. (M.C.) 98; Arch. Cr. Pldg. 817; *Reg. v. Tyson*, L. R. 1 C. C. R. 107; 37 L. J. (M.C.) 7; 16 W. R. 317; *Reg. v. Murray*, 1 F. & F. 80; *Reg. v. Alsop*, 5 C. L. J. N. S. 159; 11 Cox, 264; *Reg. v. Naylor*, 11 Cox, 13; W. R. 374; *Reg. v. Courtney*, 7 Cox, 111; 5 Ir. L. R. N. S. 434; *Reg. v. Dunston*, Ry. & M. 109; *Reg. v. Goodard*, 2 F. & F. 361.

(*k*) *Reg. v. Pedley*, 1 Leach, 327; *Reg. v. Schlesinger*, 10 Q.B. 670; 17 L. J. (M. C.) 29; Arch. Cr. Pldg. 818.

The false oath must be taken deliberately and intentionally; for, if done from inadvertence or mistake, it cannot amount to voluntary and corrupt perjury. (*l*)

It would seem that perjury may be assigned, when the oath is administered upon the Common Prayer book of the Church of England. (*m*)

Where, in an indictment for perjury, the defendant was alleged to have sworn that no notice of the disqualification of a candidate for township councillor had been given previous to or at the time of holding the election, the perjury assigned being that such notice had been given previous to the election, and the notice appearing to have been given on the nomination of the candidate objected to; it was held that the assignment of perjury was not proved, as an election, under the Municipal Act, is commenced when the returning officer receives the nomination of candidates, and it is not necessary, to constitute an election, that a poll should be demanded. (*n*)

The false oath must be clear and unambiguous. But where a joint affidavit, made by defendant and one D., stated, "each for himself maketh oath, and saith that, etc., and that he, this deponent, is not aware of any adverse claim to or occupation of said lot;" the defendant having been convicted of perjury upon this latter allegation, it was held that there was neither ambiguity nor doubt in what each defendant said; but that each, in substance, stated that he was not aware of any adverse claim to or occupation of said lot. (*o*)

It would seem that a magistrate taking an affidavit without authority is guilty of a misdemeanor, and that a criminal information will lie against him for so doing. (*p*)

To constitute perjury at common law, it is not necessary that an affidavit should be read or used; for the crime is

(*l*) Arch. Cr. Pldg. 818-19.

(*m*) *McAdam v. Weaver*, 2 Kerr, 176; *Rokeby v. Langston*, 2 Keb. 314.

(*n*) *Reg. v. Cowan*, 24 U. C. Q. B. 606.

(*o*) *Reg. v. Atkinson*, 17 U. C. C. P. 295.

(*p*) *Jackson v. Kassel*, 26 U. C. Q. B. 346, per Draper, C. J.

complete on the affidavit being sworn to, though no use was afterwards made of it; but, under the 5 Eliz., c. 9, as nothing can be an offence within it unless some one is actually aggrieved, the affidavit must be read or used. (q)

To sustain a conviction for perjury, it is not necessary that the jurat of the affidavit, upon which the perjury is assigned, should contain the place at which the affidavit was sworn, for the perjury is committed by the taking of the oath, and the jurat, so far as that is concerned, is not material, and although through the defective jurat the affidavit could not be received in court, yet perjury may be committed in an affidavit which the court would refuse to read. The jurat is no part of the affidavit. (r)

There can be no accomplices in perjury. (s)

It has been held that, on an indictment for perjury, the defendant must appear and submit to the jurisdiction of the court, before he can be allowed to plead, and that this rule applies to misdemeanors as well as felonies. (t)

An indictment for perjury charged that it was committed on the trial of an indictment against A. B., at the Court of Quarter Sessions for the county of B., on the 11th of June 1867, on a charge of larceny; which was held sufficient, and that it was not necessary to specify the property stolen, the ownership thereof, or the locality from which it was taken, nor to allege that the indictment was in the name of the Queen, as the court must take judicial notice of the fact that Her Majesty alone could prosecute on a charge of larceny. (u) This decision was, to some extent, founded on the provisions of the Con. Stats. Can., c. 99, ss. 39 and 51; and as those of the 32 & 33 Vic., c. 23, s. 9, are the same in substance, the decision will still hold.

Although, in an indictment for obtaining money or goods by false pretences, the property in the money or goods must

(q) *Milner v. Gilbert*, 1 Allen, 57.

(r) *Reg. v. Atkinson*, 17 U. C. C. P. 295.

(s) *Reg. v. Pelletier*, 1 *Revue Leg.* 565.

(t) *Reg. v. Maxwell*, 10 L. C. R. 45.

(u) *Reg. v. Macdonald*, 17 U. C. C. P. 635.

be alleged, yet in reciting such a prosecution, upon which to found a charge of perjury, it seems the same particularity would not be necessary, otherwise the false pretence should be set out too, and it was only after a long course to the contrary that it was at length determined the false pretences should be set out in the indictment, for the specific offence. (v)

Where an indictment for perjury stated that a cause was pending in the county court, in which A. and B. were plaintiffs and C. defendant; that, on the hearing of such cause, it "became a material question whether the said A. had, in the presence of the prisoner, signed at the foot of" a certain bill of account, purporting to be a bill of account between a certain firm called A. & Co. and the aforesaid C., a receipt for payment of the amount of the said bill, "and that the said prisoner did" falsely, corruptly, and maliciously swear that the said A. did, on a certain day, in the presence of the prisoner, sign the said receipt (meaning a receipt at the foot of the said first mentioned bill of account for the payment of the said bill), whereas, etc.: it was held sufficiently certain. (w)

And an indictment for perjury which stated the offence to have been committed on the trial of "a certain indictment for misdemeanor," at the Quarter Sessions for the county of Salop, but did not state what the misdemeanor was, so as to show that the court had jurisdiction to try it, nor expressly averred that the court had such jurisdiction, was held good. (x)

The 32 & 33 Vic., c. 23, s. 9, renders it unnecessary to set forth the authority to administer the oath. This Act was passed to do away with technical forms of indictments, and where an indictment contains every averment required by this section, it is by the express terms of the section sufficient, although it does not contain any express or equivalent

(v) *Reg. v. Macdonald*, 17 U. C. C. P. 638, per *A. Wilson, J.*; *Rex v. Mason*, 2 T. R. 581.

(w) *Reg. v. Webster*, 5 U. C. L. J. 262; 1 F. & F. 515.

(x) *Reg. v. Dunning*, L. R. 1 C. C. R. 290.

avermment that the court had competent authority to administer the oath. (y)

Where it appeared, on the face of an indictment for perjury, that the statement complained of was made before a justice of the peace, in preferring a charge of larceny committed within his jurisdiction, it was held unnecessary to allege expressly that he had authority to administer the oath. (z)

An indictment for perjury, which charged the defendant with having sworn falsely in certain proceedings before justices, wherein he was examined as a witness, the allegation of materiality averred that "the said D. R. (the defendant) being so sworn as aforesaid, it then and there became material to inquire and ascertain, etc., was held bad, as not sufficiently showing that the alleged perjury was committed at the said proceedings, and that the words "upon the trial" should have been used. (a)

In 32 & 33 Vic., c. 23, s. 9, "the substance of the offence charged" means that the charge must contain such a description of the crime that the defendant may know what crime he is called upon to answer; that the jury may appear to be warranted in their conclusion of guilty or not guilty upon the premises delivered to them, and that the court may see such a definite crime that they may apply the punishment which the law prescribes. (b)

Where a prosecutor has been bound by recognizance to prosecute and give evidence against a person charged with perjury, in the evidence given by him on the trial of a certain suit, and the grand jury have found an indictment against the defendant, the court will not quash the indictment because there is a variance in the specific charge of

(y) *Reg. v. Dunning*, L. R. 1 C. C. R. 294-5, per O'hannel, B.

(z) *Reg. v. Callaghan*, 20 U. C. Q. B. 364.

(a) *Reg. v. Ross*, 1 Oldright, 683; and see 32 & 33 Vic., c. 29, sch. A. Perjury, 291.

(b) *Reg. v. Macdonald*, 17 U. C. C. P. 638, per A. Wilson. J.; *Reg. v. Horne*, Cowp. 682.

perjury contained in the information and that contained in the indictment, provided the indictment sets forth the substantial charge contained in the information, so that the defendant has reasonable notice of what he has to answer. (c)

An indictment for perjury, based upon an oath alleged to have been made before the "judge of the General Sessions of the Peace in and for the said district" [of Montreal], instead of, as the fact was, before the "judge of the Sessions of the Peace in and for the city of Montreal," that being the proper title of the judge, may be amended after the plea of not guilty. (d)

Where an attempt to incite a woman to take a false oath consisted of a letter written by defendant, dated at Bradford, in the county of Simcoe, purporting but not proved to bear the Bradford post mark, and addressed to the woman at Toronto, where it was received by her: it was held that the case could be tried in York. (e)

The 32 & 33 Vic., c. 23, s. 10, contains provisions as to the form of the indictment, whether the offence has or has not been actually committed, and section 8 provides that any person accused of perjury may be tried and convicted in any district, county or place, where he is apprehended, or is in custody.

The ordinary conclusion of an indictment for perjury, "did thereby commit wilful and corrupt perjury," may be rejected as surplusage. (f)

It has been held under the 14 & 15 Vic., c. 100, s. 1, (g) that the judge had power to amend an indictment for perjury, describing the justices before whom the perjury was committed as justices for a county, where they are proved to be justices for a borough only. (h)

(c) *Reg. v. Broad*, 14 U. C. C. P. 168.

(d) *Reg. v. Pelletier*, 15 L. C. J. 146.

(e) *Reg. v. Clement*, 26 U. C. Q. B. 297.

(f) *Reg. v. Hodgkiss*, L. R. 1 C. C. R. 212; 39 L. J. (M. C.) 14; *Ryalls v. Reg.*, 11 Q. B. 781.

(g) See 32 & 33 Vic., c. 29, s. 71.

(h) *Reg. v. Western*, L. R. 1 C. C. R. 122; 37 L. J. (M. C.) 81.

By 26 Vic., c. 29, s. 7, it is enacted that witnesses before commissioners for inquiring into the existence of corrupt practices at elections shall not be excused from answering questions, on the ground that the answers thereto may criminate them, and that "no statement made by any person, in answer to any question put by such commissioners, shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal." It was held that, "except in cases of indictments for perjury," applies only to perjury committed before the commissioners; and, therefore, on an indictment for perjury, committed on the trial of an election petition, evidence of answers to commissioners appointed to inquire into the existence of corrupt practices at the election in question is not admissible. (i)

Some one or more of the assignments of perjury must be proved by two witnesses, or by one witness and the proof of other material and relevant facts, confirming his testimony. (j) And the assignment so proved must be upon a part of the matter sworn, which was material to the matter before the court, at the time the oath was taken. (k)

Where three witnesses proved that the prisoner had made parol statements, contradictory to the truth of the statement upon which perjury was assigned, and the evidence of several witnesses went to confirm the truth of such parol statements, but there was no direct evidence that they were true, a conviction for perjury was supported. (l)

The 32 & 33 Vic., c. 23, s. 8, applies to all cases of perjury, and not merely to "perjuries in insurance cases," which is the heading under which the sections from 4 to 12 are placed. Therefore a magistrate acting in the county of Halton, has jurisdiction to take an information against, and

(i) *Reg. v. Buttle*, L. R. 1 C. C. R. 248.

(j) *Reg. v. Boulter*, 2 Den. 396; 21 L. J. (M. C.) 57; 3 C. & K., 236; *Reg. v. Webster*, 1 F. & F. 515; *Reg. v. Braithwaite*, *ibid.* 638; *Reg. v. Shaw*, L. & C. 579; 34 L. J. (M. C.) 169; Arch. Cr. Pldg 822.

(k) *Ibid.*; see also *Reg. v. Muscot*, 10 Mod. 194; *Reg. v. Lee*, 2 Russ. 650; *Reg. v. Gardner*, 8 C. & P. 737; *Reg. v. Roberts*, 2 C. & K. 607.

(l) *Reg. v. Hook*, 4 U. C. L. J. 241; Dears. & B. 606; 27 L. J. (M. C.) 252.

to apprehend and bind over, a person charged with perjury committed in the county of Wellington. (m)

Conspiracy.—A conspiracy is an agreement by two persons or more, to do, or cause to be done, an act prohibited by penal law, or to prevent the doing of an act ordained under legal sanction, by any means whatever, or to do, or cause to be done, an act, whether lawful or not, by means prohibited by penal law. (n)

It is otherwise defined as a crime which consists either in a combination and agreement by persons to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means. (o) And a further extension of the definition is as follows: An agreement made with a fraudulent or wicked mind to do that which, if done, would give to the prisoner a right of suit, founded on fraud or on violence, exercised on or toward him, is a criminal conspiracy. (p)

Conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such design rests in intention only, it is not indictable. But where two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means. (q) The conspiracy or unlawful agreement is the gist of the offence. (r)

As it is thus complete, by a mere combination of persons, to commit an illegal act, or any act whatever, by illegal means, the parties will be liable, though the conspiracy has

(m) *Reg. v. Currie*, 31 U. C. Q. B. 582.

(n) *Reg. v. Roy*, 11 L. C. J. 93, per *Drummond*, J.

(o) *Reg. v. Vincent*, 9 C. & P. 91, per *Alderson*, B.; *Reg. v. Roy*, *supra*, 92, per *Drummond*, J.

(p) *Reg. v. Aspinall*, L. R. 2 Q. B. D. 48; *Reg. v. Warburton*, L. R. 1 C. C. R. 274.

(q) *Mulcahy v. Reg.* L. R. 3 E. & I. App. 306, 317, 328.

(r) *Horseman v. Reg.* 16 U. C. Q. B. 543; *Reg. v. Seward*, 1 A. & E. 706; 3 L. J. (M. C.) 103; *Reg. v. Richardson*, 1 M. & Rob. 402; *Reg. v. Kenrick*, 5 Q. B. 49; 12 L. J. (M. C.) 135; 3 Russ. Cr. 116.

not been actually carried into execution. (s) The actual execution of the conspiracy need not be alleged in the indictment. (t)

For the same reason, it is not necessary that the object should be unlawful ; and in many cases an agreement to do a certain thing has been considered as the subject of an indictment for conspiracy, though the same act, if done separately by each individual, without any agreement amongst themselves, would not have been illegal. (u)

The rule is, that when two fraudulently combine, the agreement may be criminal, although, if the agreement were carried out, no crime would be committed, but a civil wrong only inflicted on the party. (v)

It is sufficient to constitute a conspiracy if two or more persons combine, by fraud and false pretences, to injure another. (w)

A fraudulent agreement, by a member of a partnership, with third persons, wrongfully to deprive his partner, by false entries and false documents, of all interest in some of the partnership property, in taking accounts for the division of the property, on the dissolution of the partnership, was held to be a conspiracy, although the offence was completed before the passing of the corresponding English section of the 32 & 33 Vic., c. 21, s. 38 (by which a partner can be criminally convicted for feloniously stealing the partnership property); for the object was to commit a civil wrong by fraud and false pretences (x)

It appears that an indictment lies not only wherever a conspiracy is entered into for a corrupt or illegal purpose, but also where the conspiracy is to effect a legal purpose by

(s) *Reg. v. Roy*, 11 L. C. J. 92, per *Drummond*, J.

(t) *Ibid.*

(u) *Rex v. Maubey*, 6 T. R. 636, per *Grose*, J. ; 3 Russ. Cr. 116.

(v) *Reg. v. Warburton*, L. R. 1 C. C. R. 276, per *Cockburn*, C. J.; 40 L. J. (M. C.) 22 ; *Reg. v. Aspinall*, L. R. 2 Q. B. D. 48.

(w) *Ibid.* 276, per *Cockburn*, C. J.

(x) *Reg. v. Warburton*, L. R. 1 C. C. R. 274.

the use of unlawful means, and this although such purpose be not effected. (y)

But in an indictment for conspiracy, an offence prohibited by penal law must be set forth either in the averment of the end or means. The indictment ought to show that the conspiracy was for an unlawful purpose, or to effect a lawful purpose by unlawful means. *Malum prohibitum*, and not *malum in se non prohibitum*, is the only foundation either as to the end or the means, upon which an indictment for conspiracy should rest. (z) But an omission in an indictment to state that the agreement was made with intent to defraud, is cured by verdict. (a)

All the definitions of conspiracy show that the offences of this nature belong to one or other of two classes. The first, where the illegal character of the object constitutes the crime; the second, where the illegal character of the means used to attain the end is the constituent feature of the offence. In the first class of cases, it is unnecessary to state in the indictment the means by which the unlawful end was attained, or sought to be reached; while in the second class, the means, or overt acts, must be specially set forth. (b)

In this case, the object was alleged to be to "cheat and defraud private individuals;" but as this was not necessarily a penal offence, and no penal offence was shown in the averment of the means used, the indictment was quashed. It was also held that the count should state of what thing or things the defendant intended to defraud the parties. (c)

An indictment, charging that defendants, H., C. and D., were township councillors of East Nissouri, and T., treasurer; that defendants, intending to defraud the council of \$300 of the moneys of said council, falsely, fraudulently, and unlawfully, did combine, conspire, confederate and agree among

(y) *Reg. v. Tailors' Com.* 8 Mod. 11; *Reg. v. Best*, 6 Mod. 185; 3 Buns. Cr. 116.

(z) *Reg. v. Roy*, 11 L. C. J. 89-93, per *Drummond*, J.

(a) *Reg. v. Aspinall*, L. R. 2 Q. B. D. 48.

(b) *Reg. v. Roy*, 11 L. C. J. 93, per *Drummond*, J.

(c) *Ibid.*

themselves, unlawfully and fraudulently to obtain and get into their hands, and did then, in pursuance of such conspiracy, and for the unlawful purpose aforesaid, unlawfully meet together, and fraudulently and unlawfully get into their hands £300 of the moneys of said council, then being in the hands of said T. as such treasurer, as aforesaid, was held bad, on writ of error, on the following grounds: The money in the hands of the treasurer was, under 12 Vic., c. 81, s. 74, the property of the municipal corporation, and the intent to defraud should have been laid as an attempt to defraud the latter of its moneys; second, there was nothing to show what the parties conspired to accomplish; third, the unlawful conspiracy, which is the gist of the offence, was not first sufficiently alleged, and the overt act stated to have been done, in pursuance of it, was not wrong or unlawful; fourth, it was not alleged that any unlawful means were had in order to get the money into the possession of the treasurer. (d)

Conspiracy is generally a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose, in common between them. (e)

Whenever a joint participation in an enterprise is shown, any act done in furtherance of the common design is evidence against all who were, at any time, concerned in it. (f) It is clearly unnecessary to prove that all the defendants, or any two of them, actually met together, and concerted the proceeding carried out. It is sufficient if the jury are satisfied, from their conduct, and from all the circumstances, that they were acting in concert. (g) But, in general, proof of concert and connection must be given before evidence is

(d) *Horseman v. Reg.*, 16 U. C. Q. B. 543.

(e) *Mulcahy v. Reg.*, L. R. 3 E. & I. App. 317, per Willes, J.; *Reg. v. Brissac*, 4 Ea. 171, per Grose, J.

(f) *Reg. v. Slavin*, 17 U. C. C. P. 205; and see *Reg. v. Shellard*, 9 C. & P. 277; *Reg. v. Blake*, 6 Q. B. 126; 13 L. J. (M. C.) 131.

(g) *Reg. v. Fellowes*, 19 U.C.Q.B. 48; and see *Reg. v. Parsons*, 1 W. Bl. 322; *Reg. v. Murphy*, 8 C. & P. 297.

admissible of the acts or declarations of any person not in the presence of the prisoner. (*h*) The prosecutor may go into general evidence of the nature of the conspiracy before he gives evidence to connect the defendant with it. (*i*)

The prisoners were indicted for conspiring to commit larceny. The evidence was that the two prisoners, with another boy, were seen by a policeman to sit together on some door-step near a crowd, and when a well-dressed person came up to see what was going on, one of the prisoners made a sign to the others, and two of them got up and followed the person into the crowd. One of them was seen to lift the tail of the coat of a man, as if to ascertain if there was anything in his pocket, but making no visible attempt to pick the pocket; and to place a hand against the dress of a woman, but no actual attempt to insert the hand into the pocket was observed. Then they returned to the door-step, and resumed their seats. They repeated this two or three times, but there was no proof of any preconcert other than this proceeding. It was held not to be sufficient evidence of a conspiracy; for to sustain a charge of conspiracy, there must be evidence of concert to do the illegal act, and the doing of an act not illegal is no evidence of a conspiracy to do an illegal one, there being no other evidence of the conspiracy than the act so done. (*j*)

In an indictment for conspiracy to obtain money by false pretences, it is not necessary to set out the pretences, as the gist of the offence is the conspiracy. (*k*) But where the conspiracy is to obtain money from certain persons, it is necessary to state who they are, for the conspiracy is to cheat them. (*l*) Where the conspiracy is to obtain goods, it is not necessary to specify the goods or describe them, as in an

(*h*) 3 Russ. Cr. 161; *The Queen's case*, 2 Brod. & B. 302; *Reg. v. Jacobs*. 1 Cox, C. C. 173; *Reg. v. Duffield*, 5 Cox, C. C. 404.

(*i*) *Reg. v. Hammond*, 2 Esp. 718.

(*j*) *Reg. v. Taylor*, 8 C. L. J. N. S. 54; 25 L. T. Rep. N. S. 75.

(*k*) *Reg. v. Macdonald*, 17 U.C.C.P. 638, per *A. Wilson, J.*; *Re v. Gill*, B. & Ald. 204.

(*l*) *Ibid.*

indictment for stealing them; stating them as "divers goods" would be sufficient. (m)

Conspiracy is an offence at common law, independently of the 33 Edw. I., c. 2. (n) A conspiracy to kidnap is a misdemeanor. (o)

A conspiracy to charge a man falsely with treason, felony or misdemeanor, is indictable: but it is not an indictable offence for two or more persons to consult and agree to prosecute a person who is guilty, or against whom there are reasonable grounds of suspicion. (p)

A conspiracy to impose pretended wine upon a man, as and for true and good Portugal wine, in exchange for goods, is indictable. (q) So a conspiracy to defraud the public by means of a mock auction or an auction with sham bidders, who pretend to be real bidders for the purpose of selling goods at prices grossly above their worth. (r) So a conspiracy by a female servant and a man, whom she got to personate her master, and marry her, in order to defraud her master's relatives of a part of his property, after his death. (s) So a conspiracy to injure a man in his trade or profession; (t) so a conspiracy, by false and fraudulent representations that a horse bought by one of the defendants from the prosecutor was unsound, to induce him to accept a less sum for the horse than the agreed price. (u) So a conspiracy to raise the prices of the public funds by false rumors, as being a fraud upon the public; (v) so a conspiracy by persons, to cause themselves to be reputed men of property, in order to defraud tradesmen; (w) so a conspiracy to defraud by means of false representations of

(m) *Reg. v. Roy*, 11 L. C. J. 92, per *Drummond*, J.

(n) *Ibid.*

(o) *Ex parte Blossom*, 10 L. C. J. 41, per *Badgley*, J.

(p) *Reg. v. Best*, 1 Salk. 174; 2 Ld. Raym. 1167.

(q) *Reg. v. Macarty*, 2 Ld. Raym. 1179.

(r) *Reg. v. Lewis*, 11 Cox, 404, per *Willes*, J.

(s) *Reg. v. Taylor*, 1 Leach, 47.

(t) *Reg. v. Eccles*, 1 Leach, 274.

(u) *Reg. v. Carlile*, 23 L. J. (M. C.) 109.

(v) *Rex v. De Berenger*, 3 M. & S. 67.

(w) *Reg. v. Roberts*, 1 Camp. 399.

the solvency of a bank or other mercantile establishment; (x) so a conspiracy by traders, to dispose of their goods in contemplation of bankruptcy with intent to defraud their creditors; (y) so a conspiracy to procure the defilement of a girl, (z) or a conspiracy to induce a woman, whether chaste or not, to become a common prostitute. (a)

But an indictment will not lie for a conspiracy to commit a mere civil trespass, (b) or for a conspiracy to deprive a man of an office under an illegal trading company. (c)

If, however, the parties conspire to obtain money by false pretences of existing facts, it seems to be no objection to the indictment for conspiracy that the money was to be obtained through the medium of a contract. (d)

A conspiracy to commit a felony or misdemeanor is indictable. (e)

Even before the 32 & 33 Vic., c. 29, s. 50, although the evidence, in support of an indictment for conspiracy, showed its object to have been felonious, or even that a felony was actually committed in the course of it, the defendants were not entitled to an acquittal on the ground that the misdemeanor had merged in the felony; nor was, or is it, any ground for arresting the judgment, that, on the face of the indictment itself, the object of the conspiracy amounts to a felony, the gist of the offence charged being a conspiracy. (f)

From the very nature of conspiracy, it must be between two persons at least, and one cannot be convicted of it unless he has been indicted for conspiring with persons to the jury unknown. (g) A man and his wife cannot be indicted

(x) *Reg. v. Edaile*, 1 F. & F. 213.

(y) *Reg. v. Hall*, 1 F. & F. 33.

(z) *Reg. v. Mears*, 2 Den. 79; 20 L. J. (M. C.) 59.

(a) *Reg. v. Howell*, 4 F. & F. 160.

(b) *Reg. v. Turner*, 13 Ea. 228.

(c) *Reg. v. Stratton*, 1 Camp. 549 n.

(d) *Reg. v. Kenrick*, 5 Q. B. 49; Dav. & M. 208; 12 L. J. (M. C.) 135.

(e) *Reg. v. Pollman*, 2 Camp. 229 n; Arch. Cr. Pldg. 938-9.

(f) *Reg. v. Button*, 11 Q. B. 929; 18 L. J. (M. C.) 19; *Reg. v. Neale*, 1 Den. 36; 1 C. & K. 591.

(g) Arch. Cr. Pldg. 942.

for conspiring alone, because they constitute one person in law. (*h*)

But one person alone may be tried for a conspiracy, provided the indictment charged him with conspiring with others who have not appeared, (*i*) or who are since dead. (*j*)

Where the indictment charged that A., B. and C. conspired together, and with divers other persons to the jurors unknown, etc., and the jury found that A. had conspired with either B. or C., but they could not say which, and there was no evidence against any other persons than the three defendants, A. was held entitled to an acquittal. (*k*) By the 31 Vic., c. 71, s. 5, conspiracy to intimidate a provincial legislative body is made felony.

(*h*) Arch. Cr. Pldg 942.

(*i*) *Reg. v. Kinnersley*, 1 Str. 193.

(*j*) *Reg. v. Nicholls*, 2 Str. 1227.

(*k*) *Reg. v. Thompson*, 16 Q. B. 832 ; 20 L. J. (M.C.) 183 ; Arch. Cr. Pldg. 942.

CHAPTER VII.

ANNOTATIONS OF MISCELLANEOUS STATUTES.

It is a sound rule to construe a statute according to the common law rather than against it, except when or so far as the statute is plainly intended to alter the common law. (a)

Statutes are usually construed strictly in criminal cases, and no construction will be adopted which the language of the statute does not plainly authorize. (b)

But they are taken strictly and literally only, in the point of defining and setting down the crime and the punishment, and not generally in words that are but circumstance and conveyance in putting the case. (c)

It has been laid down that the court will construe a penal statute according to its spirit and the principles of natural justice ; and cases may possibly arise in which, although a person, according to the letter of the Act, may be liable to the penalty, yet the court will direct the jury to acquit him, he not having offended against its spirit and intention. (d)

By 31 Vic., c. 1, s. 6, thirty-ninthly, every Act shall be deemed remedial, and shall be construed as such. In construing a remedial statute, the substance of its provisions must be looked to, (e) and the court will construe it liberally. (f)

In construing the Consolidated Statutes of Canada, the court may refer to the original enactments, in order to

(a) *Reg. v. Morris*, L. R. 1 C. C. R. 95, per *Byles*, J.

(b) See *Reg. v. O'Brien*, 13 U. C. Q. B. 436 ; see also *Reg. v. Brown*, 4 U. C. Q. B. 149, per *Robinson*, C. J. ; *Wilt v. Lai*, 7 U. C. Q. B. 537, per *Robinson*, C. J.

(c) *Dwarris*, 634.

(d) *Attorney General v. Mackintosh*, 2 U. C. Q. B. O. S. 497.

(e) *Reg. v. Proud*, L. R. 1 C. C. R. 74, per *Kelly*, C. B.

(f) *McFarlane, v. Lindsay*, Draper, 142 ; *Dwarris*, 614.

arrive at a right conclusion. (g) No man can be deprived of any right or privilege, under any statutory enactment, by mere inference, or by any reasons founded solely upon convenience or inconvenience. Statutes are to be construed in reference to the principles of common law, or of the law in existence at the time of their enactment. It is not to be presumed that the legislature intended to make any innovation upon the common or then existent law, farther than the case absolutely required ; and judges must not put upon the provisions of a statute a construction not supported by the words. (h)

The court will not put an interpretation upon an Act to give it a retrospective effect, so as to deprive a man of his right. (i) In general, the court will not ascribe retrospective force to new laws affecting rights, unless, by express words or necessary implication, it appears that such was the intention of the legislature. (j)

But the court cannot refuse to give effect to an *ex post facto* statute, which is clearly so in its terms. (k) A prisoner is liable to be indicted, on the 29 & 30 Vic., cc. 2 & 3, for unlawfully invading Quebec on a day antecedent to the passing of the statute. (l)

In construing an Act of Parliament, as in construing a deed or a contract, we must read the words in their ordinary sense, and not depart from it, unless it is perfectly clear, from the context, that a different sense ought to be put on them. (m) A statute must be taken as it is, and when its object is to protect public interests, its clauses must be received in that light. (n) A statutory enactment should be so construed as

(g) *Whelan v. Reg.* 28 U. C. Q. B. 108.

(h) *Reg. v. Vonhoff*, 10 L. C. J. 293, per *Drummond*, J.

(i) *Attorney General v. Halliday*, 26 U. C. Q. B. 414, per *Draper*, C. J.; *Evans v. Williams*, 11 Jur. N. S. 256.

(j) *Phillips v. Eyre*, L. R. 6 Q. B. 23, per *Willes*, J.

(k) *Reg. v. Madden*, 10 L. C. J. 342.

(l) *Ibid.*

(m) *Reg. v. Chandler*, 1 Hannay, 551, per *Ritchie*, C. J.

(n) *Reg. v. Patton*, 13 L. C. R. 316, per *Mondelet*, J.

to make the remedy co-extensive with the mischief it is intended to prevent. (o)

Where two statutes are in *pari materia*, and by the enactments of the latter statute expressly connected together, they are to be taken as one Act. (p) And even when a statute refers to another, which is repealed, the words of the latter Act must still be considered as if introduced into the former statute. (q)

In general, an affirmative statute does not alter the common law. (r)

Where general words follow particular ones, the rule is to construe them as applicable to persons *ejusdem generis*. (s) In accordance with this principle, the words "or other persons whatsoever," in the Con. Stats. U. C., c. 104, s. 1, cannot be taken to include all persons doing anything whatever on a Sunday, but must be taken to apply to persons following some particular calling of the same description as those mentioned. (t) There can be no estoppel against an Act of Parliament. If the transaction contravening the Act be in reality illegal, no writing or form of contract, or color given, can prevent an inquiry into the actual facts. (u) It would seem that the principle of estoppel does not apply as against the public interest. (v)

It is a general rule that subsequent statutes, which add accumulative penalties and institute new methods of proceeding, do not repeal former penalties and methods of proceeding ordained by preceding statutes, without negative words. Nor has a later Act of Parliament ever been con-

(o) *Reg. v. Allen*, L. R. 1 C. C. R. 375, per Cockburn, C. J.

(p) *Reg. v. Beveridge*, 1 Kerr, 68, per Chipman, C. J.

(q) *Dwarria*, 571.

(r) *Dwarria*, 473-4; and see *Levinger v. Reg.* L. R. 3 P. C. App. 282.

(s) *Sandiman v. Breach*, 7 B. & C. 100.

(t) *Hespeler and Shaw*, 16 U. C. Q. B. 104, per Robinson, C. J.; see also *Reg. v. Hynes*, 13 U. C. Q. B. 194; *Reg. v. Sylvester*, 33 L. J. (M. C.) 79; *Reg. v. Tinning*, 11 U. C. Q. B. 636; *Reg. v. Armstrong*, 20 U. C. Q. B. 245.

(u) *Battersbey v. Odell*, 23 U. C. Q. B. 482.

(v) See *Reg. v. Ewing*, 21 U. C. Q. B. 523.

strued to repeal a prior Act, unless there be a contrariety or repugnance in them. (*w*)

In *Foster's case* (*x*) it was held that the law does not favor a repeal by implication, unless the repugnance be very plain. A subsequent Act, which can be reconciled with a former Act, shall not be a repeal of it, though there be negative words. The 1 & 2 Ph. & M., c. 10, which enacts that all trials for treason shall be according to the course of the common law, and not otherwise, does not take away 35 Hy. VIII., c. 2, for trial of treason beyond sea. (*y*)

The rule is, *leges posteriores priores contrarias abrogant*. If both statutes be in the affirmative, they may both stand; but if the one be a negative and the other an affirmative, or if they differ in matter, although affirmative, the last shall repeal the first. So, if there be a "contrariety in respect of the form prescribed," a repeal will also be effected. (*z*)

We will now consider some miscellaneous statutes relating to criminal law.

The 31 Vic., c. 14, seems now to be the governing enactment, protecting the inhabitants of Canada against lawless aggressions from subjects of foreign countries at peace with Her Majesty. It extends the 3 Vic., c. 12, (*a*) and the 29 & 30 Vic., cc. 2, 3, & 4, respectively, to the whole of Canada. (*b*)

The Imperial statute 11 & 12 Vic., c. 12, did not override the 3 Vic., c. 12, (*c*) for the latter was re-enacted by the consolidation of the statutes, which took place in 1859, and is, therefore, later in point of time than the Imperial statute. (*d*)

(*w*) Dwarria, 532-3.

(*x*) 11 Rep. 63.

(*y*) *Reg. v. Sherman*, 17 U. C. C. P. 168, per *J. Wilson, J.*

(*z*) See *O'Flaherty v. McDowell*, 4 Jur. N. S. 33; *Reg. v. Sherman*, *supra*, 170, per *A. Wilson, J.*

(*a*) Con. Stata. U. C., c. 98.

(*b*) See also the 31 Vic., c. 16, and 33 Vic., c. 1.

(*c*) *Reg. v. School*, 26 U. C. Q. B. 212.

(*d*) *Reg. v. Slavin*, 17 U. C. C. P. 205.

A British subject who has become a naturalized citizen of a foreign state is a "citizen or subject of any foreign state or country," within the statute. (e) Although, where a person is born within the Queen's dominions, the rule is, "once a British subject, always one," yet the Crown may waive the right of allegiance, and try him as an American citizen, if he claim to be such. (f)

If the prisoner appeared clearly to be a British subject, and there was no evidence that he was an American citizen, he would still be indictable under our statute law for substantially the same felony, with some variation of statement; (g) for his offence in such case would partake of the nature of treason, and where the Crown has the right to deal with a party as a traitor, it may proceed against him as guilty only of felony. (h) And the prisoner's own admissions, and declarations, of the country to which he belongs, are evidence against him. (i)

At an early hour, on the first of June, 1866, about eight hundred men landed at Fort Erie, in arms, coming in canal boats towed by tugs, the inference being irresistible that they were from the United States. The prisoner was seen among them, armed with a revolver. The Canadian volunteers in uniform were attacked at Lime Ridge by these men, who were called Fenians, and some were killed and wounded. The prisoner was within half a mile of the battle-field, and attended the wants of the wounded on both sides, and heard the confession of five wounded Fenians. On the day before, the prisoner was talking with the Fenians in their camp, two or three being then officers, and seemed friendly with them. When the Fenians moved, on that day, from their camp, some of them left their valises behind, and the prisoner said, "Pick up the valises; the boys may want them: we do not know

(e) *Reg. v. McMahon*, 26 U. C. Q. B. 195.

(f) *Reg. v. Lynch*, 26 U. C. Q. B. 208.

(g) See 31 Vic., c. 14, s. 3; *Reg. v. Lynch*, 26 U. C. Q. B. 211.

(h) *Reg. v. McMahon*, 26 U. C. Q. B. 201.

(i) *Reg. v. Slavin*, 17 U. C. C. P. 205.

how long we may stay in Canada." The men picked up the valises, and the prisoner followed them. He spoke to the men, and told them to take care of themselves, and said to some bystanders: "Don't be afraid, we do not want to hurt civilians." Some one said they wanted to see red coats, and the prisoner said, "Yes; that was what they wanted." It was held that these facts were sufficient to go to the jury, to establish that the Fenians entered the province with intent to levy war against the Queen, and that the prisoner was connected with them, and consequently involved in their guilt; and this even if he had carried no arms. (*j*) Another prisoner belonging to the same body asserted that he came over with the invaders as reporter only, but it was held that this could form no defence, for there was a common unlawful purpose, and the presence of any one in any character, aiding and abetting or encouraging the prosecution of the unlawful design, must involve a share in the common guilt. The facts above stated were held evidence of an intent to levy war. (*k*)

The fact of the invaders coming from the United States would be *prima facie* evidence of their being citizens or subjects thereof.

This intent, as laid down in *Frost's case*, (*l*) may be collected from the acts of the accused, the *bellum percussum* of the body, with which he is identified, and does not require the passing of a resolution, or a verbal or written declaration, plainly expressive of a purpose to levy war. (*m*) When the prisoner was in arms at Fort Erie, in Ontario, at four o'clock in the morning of the attack made upon the volunteers, and that he had been there with the armed enemy the night before: it was held evidence that he was in arms in Upper Canada with intent to levy war, notwithstanding his statement that he had found the weapons, with which he was

(*j*) *Reg. v. McMahon*, 26 U.C.Q.B. 195; *Reg. v. Slavin*, 17 U.C.C.P. 205.

(*k*) *Reg. v. Lynch*, 26 U. C. Q. B. 208; and see *Reg. v. School*, *ibid.* 214.

(*l*) 9 C. & P. 150.

(*m*) *Reg. v. Slavin*, 17 U. C. C. P. 205.

armed, upon the road, and the fact that there was evidence of his having been unarmed the night before.

Evidence was properly admitted, against a prisoner, of the engagement above alluded to, although the same took place several hours after his arrest. (n)

Where there are two sets of counts, one charging the prisoner as a citizen of the United States, the other as a subject of Her Majesty, the Crown is not bound to elect on which it will proceed. (o)

Where the prisoner was indicted under C. S. U. C., c. 98, as amended by 29 & 30 Vic., c. 41, and charged as a citizen of the United States, but was acquitted on proving himself to be a British subject, and then indicted under the same section as a subject of Her Majesty, he cannot plead *autrefois acquit*. (p)

Under s. 11 of the 28 Vic., c. 1, for repressing outrages on the frontier, the court can only order restoration of property seized, when it appears that the seizure was not authorized by the Act. (q) On the facts of this case, they refused to interfere, holding that the collector, who seized, had probable cause for believing that the vessel was intended to be employed in the manner pointed out by the ninth section. (r)

The 32 & 33 Vic., c. 20, s. 26, provides that whosoever unlawfully abandons or exposes any child, being under the age of two years, whereby the life of such child is endangered, or the health of such child has been, or is likely to be, permanently injured, is guilty of a misdemeanor.

As this statute uses the word "unlawfully," it would seem that it only applies to persons on whom the law casts the obligation of maintaining and protecting the child, and makes this a duty. A person who has the lawful custody and possession of the child, or the father who is legally bound to

(n) *Reg. v. Slavin*, 17 U. C. C. P. 205.

(o) *Reg. v. School*, 26 U. C. Q. B. 212.

(p) *Reg. v. McGrath*, 26 U. C. Q. B. 385.

(q) *Re Georgian*, 25 U. C. Q. B. 319.

(r) *Ibid.*

provide for it, may offend against the provisions of the statute. But where two persons, strangers to the child, were indicted under this clause, the court held they were entitled to an acquittal. (s)

It would seem, also, if the child dies the clause does not apply, but the prisoner would be guilty of murder or manslaughter, according to the circumstances. (t)

A woman who was living apart from her husband, and who had the actual custody of their child under two years of age, brought the child, on the 19th of October, and left it at the father's door, telling him she had done so. He knowingly allowed it to remain lying outside his door, and subsequently in the roadway, from about 7 P.M. till 1 A.M., when it was removed by a constable, the child then being cold and stiff but not dead. It was held that, though the father had not had the actual custody and possession of the child, yet, as he was by law bound to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child by him, whereby its life was endangered, within the meaning of the corresponding English section of 32 & 33 Vic., c. 20, s. 26. (u)

A. and B. were indicted, for that they did abandon and expose a certain child, then being under the age of two years, whereby the life of the child was endangered. A., the mother of a child five weeks old, and B., put the child into a hamper, wrapped up in a shawl, and packed with shavings and cotton-wool, and A., with the connivance of B., took the hamper to M., about four or five miles off, to the booking-office of the railway station there. She there paid for the carriage of the hamper, and told the clerk to be very careful of it, and to send it to G. by the next train, which would leave M. in ten minutes from that time. She said nothing as to the contents of the hamper, which was

(s) *Reg. v. White*, L. R. 1 C. C. R. 311.

(t) See *ibid.* 314, per *Blackburn*, J.

(u) *Key. v. White*, L. R. 1 C. C. R. 311.

addressed, "Mr. Carr's, Northoutgate, Gisbro,—with care : to be delivered immediately,"—at which address the father of the child was then living. The hamper was carried by the ordinary passenger train from M. to G., leaving M. at 7.45, and arriving at G. at 8.15, p.m. At 8.40 p.m. the hamper was delivered at its address. The child died three weeks afterwards from causes not attributable to the conduct of the prisoners. On proof of these facts at the trial, it was objected, for the prisoners, that there was no evidence to go to the jury that the life of the child was endangered, and that there was no abandonment and exposure of the child, within the meaning of the statute. The objections were overruled, and the prisoners found guilty ; and it was held by a majority of the fifteen judges that the conviction should be affirmed. (v)

In the indictment of a husband under sec. 25 of the same statute, for neglecting to provide his wife with necessary food and clothing, it is not necessary to allege that the defendant had the means and was able to provide such food and clothing ; nor that the neglect on the part of defendant to provide such food and clothing endangered the life or affected the health of his wife. (w) But the wife's need and husband's ability must appear in evidence. (x) An allegation that the wife is ready and willing to live with her husband is surplusage. (xx)

The 32 & 33 Vic., c. 32, which contains provisions respecting the prompt and summary administration of criminal justice in certain cases, was extended to Manitoba by 37 Vic., c. 39 ; to Prince Edward Island by 40 Vic., c. 4 ; to Keewatin by 39 Vic., c. 21 ; and to British Columbia by 37 Vic., c. 42. It repeals and substantially re-enacts the provisions of the former statute, Con. Stats. Can., c. 105, so that

(v) *Reg. v. Falkingham*, L. R. R. 1 C. C. 222.

(w) *Reg. v. Smith*, 23 L. C. J. 247.

(x) *Reg. v. Nasmith*, 42 U. C. Q. B. 242.

(xx) *Ibid.*

the decisions under the old will equally apply to the new Act.

Imprisonment is only authorized under this statute as a substantive punishment; and a conviction, therefore, imposing a fine, and directing imprisonment for a term unless the fine be sooner paid, is bad. (y)

It is not necessary that the disorderly conduct should be visible from the outside of the house. (z)

A person letting a house to several young women for the purpose of prostitution, cannot be indicted under this statute. (a)

Under this Act it is no objection that the commitment stated the offence to have been committed on the 11th of August, and the conviction on the 10th. (b) And a conviction for keeping a house of ill-fame on the 11th October, and on other days and times, is sufficiently certain. (c)

Nor is it material that the commitment or conviction charge that the prisoner "was the keeper of," or "that she did keep," instead of designating the offence as "keeping any disorderly house," etc., as in the statute. (d)

The limits of the city of Toronto having been assigned by a public statute, the court takes judicial notice of them in determining the jurisdiction of the magistrate. (e)

A commitment is good though it does not show that the party was charged before the convicting magistrate. This might, however, and probably would, be a defect in the conviction.

A variance between the conviction and the information, the latter being that defendant was the keeper of a well-known disorderly house, and the former that the prisoner did keep a common disorderly bawdy house, is immaterial. (f)

(y) *Re Slater*, 9 U. C. L. J. 21.

(z) *Reg. v. Rice*, L. R. 1 C. C. R. 21.

(a) *Reg. v. Stannard*, 9 Cox C. C. 405; *Reg. v. Barrett*, *ibid.* 255.

(b) *Reg. v. Munro*, 24 U. C. Q. B. 44.

(c) *Reg. v. Williams*, 37 U. C. Q. B. 540.

(d) *Reg. v. Smith*, *supra*.

(e) *Reg. v. Munro*, *supra*.

(f) *Reg. v. Smith*, 24 U. C. Q. B. 44.

It is no objection that no notice had been put up, as required by s. 25 (g) of the same Act, to show that the court was that of a police magistrate, not of an ordinary justice of the peace; for the jurisdiction, in the absence of express enactment, could not be made to depend on the omission of the clerk to post up such notice.

The charge of "keeping a common disorderly bawdy house" is sufficiently certain. (h) And the place of committing the offence is sufficiently laid, though not stated in express terms, if the county be stated in the venue, and the parties described as of some locality in that county in which the magistrates have jurisdiction. (i)

In a case of this kind, affidavits are receivable upon the question, whether the magistrate had jurisdiction or no, and an affidavit stating the non-compliance with the requirements of s. 25 was received, though offered with a view to show that the magistrate had not jurisdiction; but it would seem affidavits are not receivable to sustain objections as to the conduct of the magistrate in dealing with the case before him. (j)

On an application for a writ of *habeas corpus* at common law, it seems affidavits may be received, but not if the writ is applied for under the statute of Charles, (k) for it confers no power to receive them.

Affidavits might, perhaps, be received that no such sentence passed, but not to impeach it; and also as to matter of fact, but not of law. (l)

When the court cannot get at the want of jurisdiction but by affidavit, it must, of necessity, be received, as if the charge were insufficient, and the magistrate mis-stated it in drawing up the proceedings, so that they appeared regular. (m) It would seem that a judge of the superior

(g) 32 & 33 Vic., c. 32, s. 26.

(h) *Reg. v. Munro*, 24 U. C. Q. B. 44.

(i) *Reg. v. Williams*, 37 U. C. Q. B. 540.

(j) *Reg. v. Munro*, 24 U. C. Q. B. 53, per *Draper*, C. J.

(k) 31 Car. II., c. 2

(l) *Re McKinnon*, 2 U. C. L. J. N. S. 327, per *A. Wilson*, J.

(m) *Ibid.*

court could not, on *habeas corpus*, inquire into the conclusion at which the magistrate, acting under this statute, has arrived, provided he had jurisdiction over the offence charged, and had issued a proper warrant upon that charge; but it seems the judge might inquire into what that charge was, or whether there was a charge at all. (n)

Under s. 3 of this Act the magistrate may, before any formal examination of witnesses, ascertain the nature and extent of the charge, and, if the party consents to be tried summarily, may reduce it into writing. It would seem that the magistrate may then (that is, when a person is charged before him, prior to the formal examination of witnesses) reduce the charge into writing, and try the party upon the charge thus reduced; and, if this is the meaning of the statute, it would not signify whether the original information and warrant to apprehend did or did not state a charge, in the precise language of the Act. (o) But the magistrate must, either by the original information, or by the charge which he makes when the party is before him, have the charge in writing, and must read it to the prisoner, and ask him whether he is guilty or not. (p)

A charge of assaulting and beating is not a charge of aggravated assault, and a complaint of the former will not sustain a conviction of the latter, under 32 & 33 Vic., c. 32, though, when the party is before the magistrate, the charge of aggravated assault may be made in writing, and followed by a conviction therefor. Under doubts as to the law and the power to receive affidavits on the disputed facts, the prisoner was admitted to bail, pending the application for his discharge, which was to be renewed in term. (q)

The meaning of the words "a competent magistrate" in the Act is defined by 37 Vic., cc. 39 & 40.

(n) *Re McKinnon*, 2 U. C. L. J. N. S. 328, per A. Wilson, J.

(o) *Ibid.* 329, per A. Wilson, J.

(p) *Ibid.*

(q) *Ibid.*

The Con. Stats. U. C., c. 76, secs. 9 and 10, and R. S. O., c. 135, (r) contain provisions respecting apprentices and minors.

Where the apprentice is a minor, it is necessary to a conviction under this statute that the articles should be executed by some one on his behalf. (s)

The satisfaction to be given (t) must be ascertained, and an absolute imprisonment for two months is not authorized by the statute.

The Acts of the various provinces which render breaches of contract criminal, have been repealed by the 40 Vic., c 35 (D); and a number of new offences created by that statute, viz, wilful and malicious breaches of contract endangering life, person or property, or of contracts with gas, water or railway companies; also wilful and malicious breaches of contracts by such companies. The word "malicious" is to be construed in the manner required in the Act respecting Malicious Injuries to Property. The object of the statute, as appears by its preamble, is to remove breaches of contract of service from the catalogue of crimes, and render such offences purely civil in their nature.

The defendant was indicted under the Banking Act of 1871, 34 Vic., c. 5, s. 62, for making a wilfully false and deceptive return; the falsity of the return consisting in the improper classification of assets and liabilities: First, large sums borrowed by the defendant's bank from other banks on deposit receipts, were classified as "other deposits payable after notice, or on a fixed day;" second, demand notes classed as "bills and notes discounted and current;" and third, overdrafts as "notes and bills discounted and current." It was held, as to the first and second of the above charges, that it was for the jury to determine the questions raised thereby as matters of fact, and not for the judge presiding at the trial; but as to the third, that as a matter of law an overdraft is not current. (u)

(r) 14 & 15 Vic., c. 11.

(s) *Reg. v. Robertson*, 11 U. C. Q. B. 621.

(t) R. S. O., c. 135, s. 19.

(u) *Reg. v. Sir Francis Hincks*, 24 L. C. J. 116.

The wilful intent under this statute, as in other cases, may be inferred from all the circumstances of the case. (v)

The R. S. O., c. 153, s. 82 *et seq.*, (w) provides for the establishment and regulation of tolls, on roads constructed by joint stock companies.

The offence created and contemplated by the statute is the exacting and taking a sum over and above the amount of toll which the collector is authorized to take. Section 128 of this statute, which makes it an offence to "take a greater toll than is authorized by law," does not apply to the case of taking toll from a person who is altogether exempt. If it did, a conviction for such offence should state the ground of exemption and the fact of exemption being claimed, so that the court could see that an offence was committed.

Where a person passed through the gate on the 10th of January, the collector giving him credit, as was usual between them, and on the 20th they had a settlement, and the toll for the 10th was then demanded, and paid; it was held that a conviction for such a demand, if illegal, could not be supported. (x)

Section 94, subs. 7, exempts any person, with horse or carriage, going to or returning from his usual place of religious worship, on the Lord's day.

If a minister attends church, according to the usage prescribed and observed by the rules of the particular persuasion to which he belongs, such church may be considered, as to him, the usual place of religious worship when he is attending it, on the day so prescribed. (y) But if a person claims exemption, he must state to the toll-keeper the grounds of his claim. (z)

A waggon of the seller carrying artificial manure to the farm of the purchaser, is within the exemption from toll, in

(v) *Reg. v. Sir Francis Hincks*, 24 L. C. J. 116.

(w) See R. S. O., c. 152, s. 82.

(x) *Reg. v. Campion*, 28 U. C. Q. B. 259.

(y) *Smith v. Barnett*, L. R. 6 Q. B. 36, per *Blackburn*, J.

(z) *Reg. v. Davis*, 22 U. C. Q. B. 333.

the 5 & 6 Wm. IV., c. 18, s. 1, as "a carriage employed in conveying manure for land." (a)

The following conviction before the magistrates, "for that the defendant did, at, etc., on or about the first day of December, and upon other days and times, before and since, take and receive toll from the informant, at the toll-gate No. 3, situate on the macadamized road between Hamilton and Brantford, in the said district, unlawfully and improperly, the said gate not being in a situation or locality authorized by law," being removed into this court by *certiorari*, was held bad in not showing that the defendant was summoned, or was heard, and in not setting out the evidence, or stating that any complaint was made, or evidence given by any one on oath; in not stating how much toll was taken, and in not showing in what respect the taking of toll was unlawful. (b)

Where tolls, fixed by the commissioners, had been exacted by a toll-gate keeper, at a gate not six miles apart from the one previously passed, the toll-gate keeper, under the 3 Vic., c. 53, s. 34, was held not liable to a summary conviction, for the statute was intended to prevent the taking of more or less toll than the commissioners had appointed. (c)

A conviction is bad which omits any statement of the information; or of the summons and appearance or default of the accused; or of his plea, denying or confessing. So in not giving the evidence, or in not showing that any toll was claimed, or what toll, or how imposed, or that any could be claimed or imposed by reason of the completion of the road, or any part of it. Also, it is fatal if it do not appear therein that the defendant had proceeded on the road with any carriage or animal liable to pay toll, and, after turning out of the road, had returned to or re-entered it, with such carriage or animal beyond the toll-gate, without paying toll, whereby payment was evaded. (d)

(a) *Foster and Tucker*, L. R. 5 Q. B. 224; see (Ont.) 32 Vic., c. 40; Con. Stats. Can., c. 86, s. 3.

(b) *Reg. v. Brown*, 4 U. C. Q. B. 147.

(c) *Reg. v. Brown*, 4 U. C. Q. B. 147.

(d) *Reg. v. Haystead*, 7 U. C. Q. B. 9.

A conviction, under s. 95 of this Act, stating that defendant wilfully passed a gate without paying, and refusing to pay toll, was held good, as sufficiently showing a demand of toll. It seems doubtful whether it would be sufficient to allege that he wilfully passed without paying, and without in any way showing a demand. (e) It was also held, in this case, that the non-exemption of the defendant, if essential to be alleged, was sufficiently stated in these words: "he, the said James Caister, not being exempted by law from paying toll on the said road;" and the Con. Stats. Can., c. 103, s. 44, throws the proof on the defendant.

Where the general form prescribed by the Con. Stats. Can., c. 103, s. 50, sched. 1, is used, it is clearly not requisite to show that the defendant was summoned or heard, or any evidence given.

It is not necessary to name any time for payment of the fine, and, in such case, it is payable forthwith. (f)

Where, assuming the facts to be true, the magistrate has jurisdiction, the conviction only can be looked to. (g)

Where the defendant, having been convicted, on the information of a toll-gate keeper, of evading toll, appealed to the Quarter Sessions, where he was tried before a jury and acquitted, this court refused a writ of *certiorari* to remove the proceedings, the effect of which would be to put him a second time on his trial, for which no authority was cited. (h)

The 32 & 33 Vic., c. 22, s. 40, enacts that whosoever, by any unlawful act, or by any wilful omission or neglect, obstructs, or causes to be obstructed, any engine or carriage, using any railway, or aids or assists therein, is guilty of a misdemeanor.

The prisoner unlawfully altered some railway signals at a railway station, from "all clear" to "danger" and "caution." The alteration caused a train, which would have

(e) *Reg. v. Caister*, 30 U. C. Q. B. 247.

(f) *Ibid.*

(g) *Ibid.*

(h) *Stewart and Blackburn*, 25 U. C. Q. B. 16.

passed the station without slackening speed, to slacken speed, and come nearly to a stand. Another train, going in the same direction and on the same rails, was due at the station in half an hour; it was held that this was obstructing a train within the meaning of the above clause. (i)

The Act is not limited to mere physical obstructions. The prisoner, who was not a servant of the railway company, stood on a railway, between two lines of rails, at a point between two stations; as a train was approaching he held up his arms, in the mode used by inspectors of the line when desirous of stopping a train between two stations. The prisoner knew that his doing so would probably induce the driver to stop or slacken speed, and his intention was to produce that effect. This caused the driver to shut off steam and diminish speed, and led to a delay of four minutes; it was held that the prisoner had obstructed a train within the meaning of the statute. (j)

The 13 & 14 Vic., c. 74, contained provisions prohibiting the sale of Indian lands, but these provisions were omitted in the Con. Stats. Can., c. 9. The subject is now regulated by the 31 Vic., c. 42, and 32 & 33 Vic., c. 6. The latter Act repeals the Con. Stats. Can., c. 9, and is to be construed as one Act with the 31 Vic., c. 42. The 13 & 14 Vic., c. 74 made the purchasing of any Indian lands, unless under the authority and with the consent of Her Majesty, a misdemeanor, and various decisions took place as to what kind of contract was within the Act. (k)

The 31 Vic., c. 42, imposes certain penalties on persons trespassing on Indian lands; but, it is apprehended, the decisions under the old Act will not apply to the 31 Vic., c. 42, as the clauses of the former have not been re-enacted.

A pawnbroker may, under Con. Stats. Can., c. 61, charge

(i) *Reg. v. Hurlfield*, L. R. 1 C. C. R. 253; 39 L. J. (M. C.) 131.

(j) *Reg. v. Hardy*, L. R. 1 C. C. R. 278.

(k) See *Reg. v. Hagar*, 7 U. C. C. P. 380; *Reg. v. Baby*, 12 U. C. Q. B. 346; *Totten v. Watson*, 15 U. C. Q. B. 392; *Little v. Keating*, 6 U. C. Q. B. O. S. 265.

any rate of interest that may be agreed upon between the parties, that statute being an enabling Act, and intended to legalize loans to poor persons at higher rates of interest than that allowed by the usury laws in force at the time of the passing of the Act. (*l*)

A conviction under the Pawnbroker's Act, R. S. O., c. 148, for neglecting to have a sign over the door, as directed by the 8th section, is not sustained by evidence of one transaction alone, for the penalty attaches only on persons "exercising the trade of a pawubroker," as mentioned in the first section, and a single act of receiving or taking a pawn or pledge is not an exercising the trade or carrying on the business of a pawnbroker. (*m*)

The Con. Stats. Can., c. 61, also contains provisions with regard to pawnbrokers.

The return of convictions by justices of the peace is now regulated by the 32 & 33 Vic., c. 31, s. 76, the 33 Vic., c. 27, s. 3, and R. S. O., c. 75. The Consolidated Statute of Upper Canada has been repealed. (*n*)

Under these statutes a justice of the peace is liable for a separate penalty for each conviction of which a return is not properly made to the sessions. (*o*)

Justices were not jointly liable in one penalty, but each in a separate penalty for the offence; (*p*) but under the 32 & 33 Vic., c. 31, it seems that only one penalty is recoverable, though the conviction be by two or more justices. (*q*)

The object of the legislature in passing the statutes, was to compel the justices to make a return of whatever fines they had imposed, in order that their diligence in collecting the fines might be quickened, and also in order that it might be known what money they should admit themselves to

(*l*) *Reg. v. Adams*, 8 U. C. P. R. 462.

(*m*) *Reg. v. Andrews*, 25 U. C. Q. B. 196.

(*n*) See 32 & 33 Vic., c. 36.

(*o*) *Donogh q. t. v. Longworth*, 8 U. C. C. P. 437; *Durragh q. t. v. Paterson*, 25 U. C. C. P. 529.

(*p*) *Metcalf q. t. v. Reeve*, 9 U. C. Q. B. 263.

(*q*) *Drake q. t. v. Preston*, 34 U. C. Q. B. 257.

have received, so that they might be made to account for it; (r) and, therefore, they are none the less bound to make their returns, although notice of abandonment of an appeal has been served. (s)

The illegality of a conviction is no excuse for not returning it, but if on that account the fine had not been levied, a return should be made explaining the circumstances. (t)

An order for the payment of money made by a justice, under the Con. Stats. U. C., c. 75, was not a conviction which it is necessary to return. (u) But a conviction under s. 165 of the Inland Revenue Act, 31 Vic., c. 8, imposing a penalty of \$200, must be returned. (v)

A conviction made by an alderman, in a city, must be returned to the next ensuing General Sessions of the Peace for the county, and not to the Recorder's Court for such city. (w)

The clerk of the peace is the clerk of all magistrates, and it is no objection that a conviction is not in the magistrate's office, but in that of the clerk of the peace. (x)

It would seem that the right to legislate on returns of convictions and fines for criminal offences belongs to the Dominion and not the Provincial Legislature. (y)

The seller of flour in barrels not marked or branded, is not liable to the penalty affixed by the 4 & 5 Vic., c. 89, s. 23, which applies only to the manufacturer or packer, and magistrates have no summary jurisdiction, when the accumulated penalties are more than £10. And when the inspector in a

(r) *O'Reilly q. t. v. Allan*, 11 U.C.Q.B. 415, per *Robinson*, C. J. ; *Atwood v. Bosser*, 30 U. C. C. P. 628.

(s) *McLellan q. t. v. McIntyre*, 12 U. C. C. P. 546.

(t) *O'Reilly q. t. v. Allan*, *supra*.

(u) *Runney q. t. v. Jones*, 21 U. C. Q. B. 370.

(v) *May q. t. v. Middleton*, 3 Ont. App. 207.

(w) *Keenahan q. t. v. Egleson*, 22 U. C. Q. B. 626 ; see also *Ollard q. t. v. Owens* 29 U. C. Q. B. 515 ; *Grant q. t. v. McFadden*, 11 U. C. C. P. 122 ; *Kelly q. t. v. Cowan*, 18 U. C. Q. B. 104 ; *Murphy q. t. v. Harvey*, 9 U. C. C. P. 528.

(x) *Reg. v. Yeomans*, 6 U. C. P. R. 66.

(y) *Clemens q. t. v. Berner*, 7 C. L. J. N. S. 126.

corporate town is the informer, he is not entitled to half the penalty. (z)

The statute only applies to flour made within the province. (a)

The R. S. O., c. 189, (b) was passed to prevent the profanation of the Lord's day.

A conviction under this Act "for that he, Jacob Hespeler, of the village of Preston, Esquire, did on Sunday, the 26th day of July last past, at the township of Waterloo, work at his ordinary calling inasmuch as he, and his men, did, make and haul in hay, on the said day," is bad, as not stating any offence within the statute, for defendant was not alleged to be of, nor to have worked at, any particular calling, nor did it state any facts from which this might be inferred. (c) The conviction should negative the exception in the statute, by stating that the work done was not one of necessity. (d)

A person is liable, under the Act, for plying with his steamboat, on Sunday, between the city of Toronto and the peninsula—persons carried between those places not being "travellers" within the meaning of the exception in the first section. (e)

Peppermint lozenges sold by a druggist must be considered *prima facie* a medicine, though not expressly asked for or sold as such, and such a sale is, therefore, within the exception of the Act. (f)

A note made on Sunday, in payment of goods sold on that day, is void between the original parties, but not as against an endorsee for value, and without notice. (g)

The giving or taking security, as an ordinary mortgage of personal property, on a Sunday is not void, as a "buying or selling," within the Act. (h)

(z) *Reg. v. Beekman*, 2 U. C. Q. B. 57.

(a) *Ibid.*

(b) See Con. Stats. U. C., c. 104.

(c) *Hespeler and Shaw*, 16 U. C. Q. B. 104.

(d) See post, "Pleading."

(e) *Reg. v. Tinning*, 11 U. C. Q. B. 636.

(f) *Reg. v. Howarth*, 33 U. C. Q. B. 537.

(g) *Houlston v. Parsons*, 9 U. C. Q. B. 681.

(h) *Wilt v. Lai*, 7 U. C. Q. B. 535.

But all sales or agreements for a sale of real or personal property made on Sunday are void. (i)

A snare to catch game is an engine within the meaning of sections 4 and 5, and putting down a snare, on a day before Sunday, for the purpose of killing game, and keeping it set on Sunday, is using an engine on Sunday and an offence within the Act, even though the party be not present using it. (j)

A farmer working on his own land on a Sunday is not liable to conviction, under 29 Car. II., c. 7, s. 1. The words "or other person whatsoever" are to be construed *ejusdem generis*, and a farmer is not *ejusdem generis*, with a tradesman, who is the only *employer* named, nor with a laborer, who is a person employed. (k)

The Imperial Act 21 Geo. III., c. 49, prohibiting amusements and entertainments on the Lord's day, is in force in Ontario. (l)

The Con. Stats. U. C., c. 19, s. 181, (m) is confined to the use of false instruments, and does not apply to the mere verbal assertion of authority. Therefore, where the prisoner had obtained payment of a sum, in discharge of a debt and costs, from a defendant (who had been previously duly served with a summons in the county court), by pretending that he was an officer of, and authorized by, the court to receive it, it was held, under analogous provisions in the Imperial statute 9 & 10 Vic., c. 95, s. 57, that the offence was not made out. (n)

But in another case, under the same clause of the statute, the prisoner was indicted for acting, and professing to act, under a false color and pretence of county court process, and it was proved that the prisoner, being a creditor of R.,

(i) *Lai v. Stall*, 6 U. C. Q. B. 506.

(j) *Allen and Thompson*, L. R. 5 Q. B. 336.

(k) *Reg. v. Silvester*, 33 L. J. (M. C.) 79.

(l) *Reg. v. Barnes*, 45 U. C. Q. B. 276.

(m) See R. S. O., c. 47, s. 216 *et seq.*

(n) *Reg. v. Myott*, 1 U. C. L. J. 35; 6 Cox, C. C. 406.

sent him a nonsensical letter, headed with the royal arms, and purporting to be signed by the clerk of a county court, threatening county court proceedings. He subsequently told R.'s wife that he had ordered the county court to send the letter, upon which she paid the debt; and, whilst making out the receipt, he made demand of her for the county court expenses; it was held that these facts constituted felony within the meaning of the section, and that the conviction must be supported. (o)

Where A. delivered to B. a document requiring him to produce accounts, etc., at a trial in a county court, intituled of the court, and giving the names of plaintiff and defendant, with a statement in the margin of the amount of the sum claimed, no such cause really existing; on an indictment against A., for feloniously causing to be delivered to B. a paper purporting to be a copy of a certain process of the county court of L., it was held that the document above mentioned was a notice to produce documents, etc., between party and party, and not a process of the court, nor did it purport to be so. (p)

B. being indebted to A., A. obtained a blank form for plaintiff's instructions to issue county court summons. This he filled up with particulars of the names and addresses of himself and B., as plaintiff and defendant, and of the nature and amount of the claim, and, without any authority, signed it in the name of the registrar, endorsing also a notice, signed also by A. in the name of the registrar, and without his authority, that unless the amount claimed were paid by B. on a certain day, an execution warrant would issue against him. This paper he delivered to B., with intent thereby to obtain payment of his debt. This was held (q) "an acting, or professing to act, under false color and pretence of process of the county court," within the meaning of 9 & 10 Vic., c. 95, s. 57. (r)

(o) *Reg. v. Evans*, 3 U.C.L.J. 119; *Dears. & B.* 236; 26 L.J. (M.C.) 92.

(p) *Reg. v. Castle*, 4 U.C.L.J. 73; *Dears. & B.* 363; 27 L.J. (M.C.) 70.

(q) Affirming *Reg. v. Evans*, *supra*.

(r) *Reg. v. Richmond*, 5 U. C. L. J. 237; *Bell*, 142.

To constitute an offence under the 3rd section of the 7 Geo. IV., c. 3, providing for the maintenance of good order in churches, the act complained of must have been committed "during divine service." (s)

An information, setting out that the defendant had conducted himself in a disorderly manner at a church door, by keeping his hat on his head during the procession of the holy sacrament, discloses no legal offence. (t)

Where a justice of the peace convicted the plaintiff, under the Con. Stats. Can., c. 92, s. 18, of making a disturbance in a place of worship, and committed him to gaol, without first issuing a warrant of distress to levy fine and costs under that section; it was held that the Con. Stats. Can., c. 103, ss. 57 and 59, applied to this conviction, and that the justice, being satisfied the party had no goods, had authority and jurisdiction, under the latter statute, to commit to gaol, without first issuing a warrant to levy fine and costs. (u)

The 32 & 33 Vic., c. 28, as amended by 37 Vic., c. 43, provides that certain persons, therein described, shall be deemed vagrants, and shall, upon conviction before any stipendiary or police magistrate, mayor or warden, or any two justices of the peace, be deemed guilty of a misdemeanor. Its operation was extended to Manitoba by the 34 Vic., c. 14, to British Columbia by the 37 Vic., c. 42, and to Prince Edward Island by the 40 Vic., c. 4.

A conviction for prostitution under sec. 1 of this Act should allege that the woman was asked, before she was taken, or at the time of her being taken, to give an account of herself, and that she did not give a satisfactory account, and that, therefore, the arrest was made. (v) And an allegation "she giving no satisfactory account," does not show that any prior demand or request has been made upon her for that purpose. (w)

(s) *Ex parte Dumouchel*, 3 L. C. R. 493.

(t) *Ex parte Filiau*, 4 L. C. R. 129.

(u) *Moffat v. Barnard*, 24 U. C. Q. B. 498.

(v) *Reg. v. Levecque*, 30 U. C. Q. B. 509.

(w) *Ibid.*

An obligation to maintain must be made out against any person charged with vagrancy being able to work and maintain himself and family. A man, for instance, is not bound to support a wife who has left him and is living in adultery; (x) nor can he be convicted if he offers to take back his wife, even though her refusal be well grounded on his ill-usage. (y) It is, however, no defence that he is industrious and constantly at work. (z)

A woman who, deserted by her husband, and having no means of maintaining her children, leaves them so that they become chargeable to the parish, cannot be convicted for running away and leaving them chargeable under the Vagrant Act 5 Geo. IV., c. 83, s. 4. (a)

It would seem a wife is not a competent witness against her husband in prosecutions under this Act. (b)

The 32 & 33 Vic., c. 20, s. 25, makes it a misdemeanor in any one, who, being legally liable, either as husband, parent, guardian or committee, master or mistress, nurse or otherwise, to provide for any person as wife, child, ward, lunatic or idiot, apprentice or servant, infant or otherwise, necessary food, clothing or lodging, to neglect or refuse wilfully and without lawful excuse to do so. (c)

In the case of a wife prosecuting under this section, it is necessary to prove that the defendant is her husband, the wife's need, and the husband's ability. If she is better able to support herself than he is to maintain her, or if she is living with another man as his wife, or if without lawful excuse she absents herself from her husband's roof and refuses to return, in these and similar cases the husband must be acquitted. (d)

The Con. Stats. Can., c. 67, s. 16, which declares it a misdemeanor, in any operator or employee of a telegraph com-

(x) *Reg. v. Flinton*, 1 B. & Ad. 227.

(y) *Flannagan v. Bishop Wearmouth*, 8 E. & B. 451.

(z) *Carpenter v. Stanley*, 33 J. P. 38.

(a) *Peters v. Cowie*, L. R. 2 Q. B. D. 131.

(b) *Reeve v. Wood*, 5 B. & S. 384.

(c) See page 201, *ante*, as to this statute.

(d) *Reg. v. Nasmyth*, 42 U. C. Q. B. 242.

pany, to divulge the contents of a private despatch, only protects the rights of each individual sender or receiver of a message, against disclosures of facts which come to the knowledge of the operators in the course of their employment. When the rights of others come in question, as when a suit is pending between the sender or receiver of a message and a third party, with whom he is alleged to have contracted, the operator or secretary of the company is bound to disclose the contents of the telegram, in obedience to a *sub-pœna duces tecum*. (e)

The 32 & 33 Vic., c. 21, s. 43, makes it a felony to send "any letter demanding of any person with menaces, without any reasonable or probable cause, any property, etc." The latter words, "without any, etc." apply to the money or property demanded, and not to the threatened accusation. (f) Therefore, if money be actually due, it is no offence to demand it with menaces. (g) The offence will be complete though the accusation was not intended to be made to a magistrate, (h) or though it was not to be made against the person threatened, but against some one in whom he has an interest, as his son. (i)

An offer to give information if money is sent, is no offence; (j) but a letter stating that an injury is intended, and the writer will not interfere to prevent it unless money is sent, amounts to an offence. (k) So threatening bodily violence, or to charge with adultery, is an offence under this section. (l)

The menace must be such as to influence a reasonable mind; (m) and a conviction may take place although the

(e) *Leslie v. Hervey*, 15 L. C. J. 9.

(f) *Reg. v. Mason*, 24 U. C. C. P. 58.

(g) *Reg. v. Johnson*, 14 U. C. Q. B. 569.

(h) *Reg. v. Robinson*, 2 Mood. 14.

(i) *Reg. v. Redman*, L. R. 1 C. C. R. 12.

(j) *Reg. v. Pickford*, 4 C. & P. 227.

(k) *Reg. v. Smith*, 1 Den. C. C. 510.

(l) *Reg. v. Chalmers*, 10 Cox, C. C. 450.

(m) *Reg. v. Walton*, L. & C. 288; 9 Cox, C. C. 268.

money has been paid, (n) or though the person threatened had no money at the time. (o)

Evidence of the truth of the accusation is not admissible by way of defence. (p)

A policeman extorting money by threatening to imprison a person on a charge not amounting to an offence in law, may be prosecuted under this statute, and may also, it seems, be indicted for larceny. (q)

The cases will apply in principle to ss. 44, 45, 46, 47 and 48 of the same statute, as also to 32 & 33 Vic., c. 20, s. 15.

By the 11 & 12 Wm. III., c. 12, and 42 Geo. III., c. 85, if any governor of a colony, or other person holding or having held public employment out of Great Britain, has been guilty of any crime or misdemeanor in the exercise of his office, every such crime may be prosecuted or inquired of, and heard and determined in the Court of King's Bench in England, either upon information by the Attorney General, or upon indictment found, and such crime may be laid to have been committed in Middlesex. An offence under the above statute is an offence committed on land beyond the seas, for which an indictment may legally be preferred in any place in England, within the 11 & 12 Wm. III., and this section and the other enactments of the statute, as to preliminary examinations, etc., before a magistrate, in whose jurisdiction the accused might be, apply to charges under the above statutes, and the Court of Queen's Bench is included in the term, "next Court of Oyer and Terminer." (r)

Upon an indictment under the Con. Stats. U. C., c. 26, s. 20, (s) for making an assignment to defraud creditors, it was held that a money bond is personally seizable on an execution under the statutes 13 & 14 Vic., c. 53, and 20 Vic., c. 57, and further, that a transfer, made by a party to a creditor, who

(n) *Reg. v. Robertson*, L. & C. 483.

(o) *Reg. v. Edwards*, 6 C. & B. 515.

(p) *Reg. v. Cracknall*, 10 Cox, C. C. 408.

(q) *Reg. v. Robertson*, 10 Cox, C. C. 9.

(r) *Reg. v. Eyre*, L. R. 3 Q. B. 487 ; see 32 & 33 Vic., c. 30, s. 3.

(s) See R. S. O., c. 118.

accepted the same in full satisfaction and discharge of his debt, did not render the party making such assignment less liable under this indictment. (*t*)

To subject a person to the penalty of the 22 Geo. II., c. 45, for suing out process, the attorney allowing his name to be used must be first convicted. (*u*)

An offence committed before, though tried after, the Revised Statutes of New Brunswick came in force, is not indictable under those statutes, though the words creating the offence are not altered thereby, the Act creating it being embodied in the Revised Statutes in its original words. The indictment must be considered as founded on the Act creating the offence. (*v*)

The punishment provided by the ordinance 4 Vic., c. 30, s. 1, is cumulative, and sentence of imprisonment and fine is to be awarded upon the conviction had against the defendant in manner and form as enacted by the ordinance. (*w*)

An overseer of the poor of a parish is liable, under the Acts of Assembly 26 Geo. III., cc. 28 & 43, and 33 Geo. III., c. 3, s. 6, to an indictment for not accounting to the first General Sessions of the Peace in the year, for moneys received by him for the support of the poor, during the preceding year. (*x*)

In an indictment of a cashier under section 62 of the Banking Act of 1871, for having unlawfully and wilfully made a false and deceptive statement in a return respecting the affairs of the bank, it is not necessary to allege that the return referred to was one required by law to be made by the accused, or that any use was made by him of such return, or to specify on what particulars the return was false, or that such false statement was made with intent to deceive or mislead. (*y*)

The enumeration in the indictment of several alleged

(*t*) *Reg. v. Potter*, 10 U. C. C. P. 39.

(*u*) *Rex v. Bidwell*, Taylor, 487.

(*v*) *Reg. v. Pope*, 3 Allen, 161; *Reg. v. McLaughlin*, *ibid.* 159.

(*w*) *Reg. v. Palliser*, 4 L. C. J. 276.

(*x*) *Reg. v. Matthew*, 2 Kerr, 543.

(*y*) *Reg. v. Cotte*, 22 L. C. J. 141.

false statements constitutes but one count, and a general verdict is sufficient if the statement be shown to be false in any one of the particulars alleged. (z)

Revised Statute of Ontario, c. 142, imposes penalties on persons who practise medicine without having been registered in that province. Where the defendant, in partnership with two registered practitioners, resided in an establishment over the door of which was a fan-light containing the name of the registered practitioners, with the addition "M. D., M. C. P. & S., Ont.," and the name of the defendant with only "M. D.," it was held that the use of the latter letters, in contradistinction to the full titles of the defendant's partners appearing on the same fan-light, was not the use of a title "calculated to lead people to infer" registration under the above statute. (a)

Militia officers attached to B. battery, though holding commissions in no regular or active militia corps, are competent to sit in courts martial of the said battery under the Militia Act. (b)

Members of the volunteer militia are *ipso facto* discharged by the expiration of the term of their engagement; and a court martial is without jurisdiction to try a man for acts done subsequently to such expiration; and a conviction under such circumstances will be quashed on *certiorari*. (c)

By 32 Vic., c. 17, of the Province of Quebec, a refractory child under fourteen may be sent to an industrial school; and the rule that where a minor is brought up by *habeas corpus*, the court will leave him to elect as to the custody in which he will be if he be of an age to exercise a choice, has no application to such a child.

The 38 Vic., c. 41, and 40 Vic., c. 33, provide for the suppression of gaming houses; and 40 Vic., c. 32, imposes penalties for gambling in public places; while 40 Vic., c. 31,

(z) *Reg. v. Cotte*, 22 L. C. J. 141.

(a) *Reg. v. Tefft*, 45 U. C. Q. B. 144.

(b) *Ex parte Thompson*, 5 Q. L. R. 200; see 31 Vic., c. 40.

(c) *Ibid.*

was passed for the repression of betting and pool-selling. The 44 Vic., c. 30, treats of prize-fighting; 41 Vic., c. 11, provides for the punishment of persons adulterating food. The 36 Vic., c. 8, regulates the carriage of dangerous goods in ships; and 38 Vic., c. 42, makes provision for enforcing the care of animals in transit. Under s. 96 of 37 Vic., c. 45, the inspection of raw hides is compulsory, in every inspection district where an inspector or deputy-inspector has been appointed; and any person selling, or offering for sale, within or exporting from such district, any raw hides without the same being first inspected and stamped or marked by the inspector or deputy, as provided by the Act, is liable to the penalty thereby imposed, and the hides so sold, offered for sale or exported, become forfeited. (d) And the person selling or exporting cannot avoid such forfeiture or penalty by himself marking the hides, according to the provisions of section 87. (e)

(d) *Clarke q. t. v. Calkin*, 4 Pugsley & B. 98.

(e) *Ibid.*

CHAPTER VIII.

EVIDENCE.

The rules of evidence are, in general, the same in civil and criminal proceedings. (a)

There are, however, some exceptions. Thus, the doctrine of estoppel has a much larger operation in the former. So an accused person may, at least if undefended by counsel, rest his defence on his own unsupported statement of facts, and the jury may weigh the credit due to that statement. Again, confessions, or other self-dis-serving statements of prisoners, will be rejected, if made under the influence of undue promises of favor or threats of punishment. So, although both these branches of the law have each their peculiar presumptions, still the technical rules, regulating the burden of proof, cannot be followed out in all their niceties when they press against accused persons. (b)

There is also a strong and marked difference in the effect of evidence in civil and criminal proceedings: in the former a mere preponderance of probability, due regard being had to the burden of proof, is sufficient basis of decision; but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. (c)

The persuasion of guilt ought to amount to such a moral certainty, as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt. (d)

(a) *Reg. v. Atkinson*, 17 U. C. C. P. 304, per *J. Wilson, J.*

(b) *Best on Evid.*, 4th ed., 122.

(c) *Clark v. Stevenson*, 24 U.C.Q.B. 209, per *Draper, C. J.*; *Hollingham v. Head*, 4 C.B.N.S. 388; *Reg. v. Jones*, 28 U.C.Q.B. 421, per *Richards, C.J.*

(d) *Reg. v. Jones*, 28 U.C.Q.B. 421, per *Richards, C. J.*; *Reg. v. Atkinson*, 17 U.C.C.P. 305, per *J. Wilson, J.*; and see *Reg. v. Chubbs*, 14 U.C.C.P. 43n.

The *onus* of proving everything essential, to the establishment of the charge against the accused, lies on the prosecutor. This rule is derived from the maxim of law, that every person must be presumed innocent until proved guilty. It is, however, in general, sufficient to prove a *prima facie* case; then, if circumstances calling for explanation are not explained, the case becomes stronger, for, as has been remarked, imperfect proofs, from which the accused might clear himself and does not, become perfect. (e) The presumption of innocence only obtains before verdict; after verdict of guilty, all presumptions will be against it. (f) The rule that the burden of proof lies on the party who, substantially, asserts the affirmative, is applicable in criminal cases. (g)

But in some cases, where negative proof is peculiarly within the knowledge of a party, he is bound to adduce it. The rule of law is plain, that where any one is proceeded against for doing an act which he is not permitted to do unless he has some special license or qualification in his favor, it is sufficient to charge this want of license or qualification against the party, and it is for the latter to prove it affirmatively; (h) for it is not incumbent on the prosecutor to give any negative evidence. (i) Still, it may be doubted whether the prosecutor must not first give some general evidence, to cast the *onus* on the other side. (j)

Where the defence calls evidence to prove facts in order to show that a Crown witness's testimony is untrue, evidence may be given by the Crown in rebuttal. (k)

In criminal cases, whether the evidence be circumstantial,

(e) *Reg. v. Jones*, 28 U.C.Q.B. 425, per *Richards*, C. J. ; *Reg. v. Atkinson*, 17 U. C. C. P. 303, per *J. Wilson*, J.

(f) *Reg. v. Hamilton*, 16 U. C. C. P. 361, per *Richards*, J.

(g) *Re Barrett*, 28 U. C. Q. B. 561, per *A. Wilson*, J. ; *Rex v. Hazy*, 2 C. & P. 458.

(h) *Re Barrett*, *supra*, 561, per *A. Wilson*, J. ; *Rex v. Turner*, 5 M. & S. 206.

(i) *Ex parte Parks*, 3 Allen, 237.

(j) See *Elkin v. Janson* 13 M. & W. 662, per *Alderson*, B. ; see, however, *Apoth. Co. v. Bentley*, R. & M. 159.

(k) *Reg. v. Tower*, 4 Pugsley & B. 168.

or direct and positive, the jury must decide, not simply that all the facts are consistent with the prisoner's guilt, but that they are inconsistent with any other rational conclusion than that the prisoner is the guilty person. (*l*)

The jury must make all necessary inferences from the facts proved, and it lies within their peculiar province to decide on the credibility of witnesses. (*m*)

In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded of explanation or contradiction. No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but, where such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, that conclusion becomes almost irresistible. (*n*)

In regard to deciding on the credibility of a witness, the jury should consider the nature of the story he tells, and his manner of telling it: the probability of its being true; his demeanor and his readiness to answer some questions, as well as his unwillingness to answer others; and his whole conduct indicating favor to one side or the other. On the other hand, the jury should consider, whether the witness exhibits a frank straightforward manner of answering questions, without regard to consequences to either party; a desire to state all the facts, and no hesitation to answer the various questions put to him. (*o*)

Where a witness, examined on the trial, directly confessed

(*l*) *Reg. v. Greenwood*, 23 U. C. Q. B. 258, per *Draper*, C. J.; *Taylor on Evid.* 84; and see *Reg. v. Jones*, 28 U. C. Q. B. 416.

(*m*) *Reg. v. Jones*, 28 U. C. Q. B. 416; *Reg. v. Greenwood*, 23 U. C. Q. B. 255; *Reg. v. Chubbs*, 14 U. C. C. P. 32; *Reg. v. Seddons*, 16 U. C. C. P. 389; *Reg. v. McIlroy*, 15 U. C. C. P. 116.

(*n*) *Reg. v. Atkinson*, 17 U. C. C. P. 305, per *J. Wilson*, J.

(*o*) *Reg. v. Jones*, 28 U. C. Q. B. 419, per *Richards*, C. J.

the crime, it was held that the judge was not bound to tell the jury that they must believe this witness, in the absence of testimony to show her unworthy of credit, but that he was right in leaving the credibility of her story to them ; and if from her manner he derived the impression that she was under the influence of some one in court, it was not improper to call their attention to it in his charge (*p*)

A prisoner, being indicted for the murder of one H., the principal witness for the Crown stated that the crime was committed on the 1st of December, 1859, on a bridge over the River Don, and that the prisoner and one S. threw H. over the parapet of the bridge into the river. S. had been previously tried and acquitted. The counsel for the prisoner proposed to prove by one D. that S. was at his (D.'s) place fifty miles off on that evening, but the learned judge rejected the evidence, saying that S. might be called, and if the Crown attempted to contradict his evidence, he would allow the prisoner to call witnesses to corroborate it. But it was held in error that the presence of S. was a fact material and not collateral to the inquiry, and that D., therefore, should have been admitted, when tendered, on the broad principle that he was called to speak on a matter directly connected with the very fact under investigation, and his evidence would affect the credibility of the evidence for the prosecution. (*q*)

But on a trial for murder by stabbing with a sharp instrument, it was proved that the prisoner struck the deceased, but that neither a knife nor other instrument was seen in his hand. Evidence for the prisoner, that the day preceding the homicide he, the prisoner, had a knife which could not have inflicted the wound of which the deceased died, and that on that day the prisoner had parted with it to a person who held it till after the crime was committed, was held to have been properly rejected, (*r*)

(*p*) *Reg. v. Jones*, 28 U. C. Q. B. 416.

(*q*) *Reg. v. Brown*, 21 U. C. Q. B. 330.

(*r*) *Reg. v. Herod*, 29 U. C. Q. B. 428.

Where a number of persons against whom warrants had been issued were met together at a certain house, and on the officers of the law attempting to arrest them, one of the latter was killed by a shot fired by some of the party, though it was not known by which, and all were indicted for murder; on the trial of one of them, it was held competent for the prisoners who were not on their trial, and were called as witnesses, to state the purpose for which they went to the house, in order to disprove the inference that they were there for an unlawful purpose, though declarations of the prisoners would not have been admissible unless accompanying and explanatory of an act, and thereby becoming a part of the *res gestæ*. (s)

Where two prisoners are jointly indicted, one of them may, in certain cases, be acquitted, and called as a witness for the other. The general rule on this point is: Where the prosecutor, in order to exclude the evidence of a material witness for the defendant, prefers his indictment against two jointly, and no evidence whatever is given against the person thus unjustly made a defendant, the judge, in his discretion, may direct the jury to acquit either during the progress or at the termination of the inquiry, so as to give an opportunity to the other defendant to avail himself of his testimony. (t)

The ground of this rule is to prevent the prosecutor from excluding the evidence of a material witness, by joining him in the indictment. But, as in a criminal case, the indictment against all the prisoners is usually found by a grand jury, and should only be found upon, at least, a *prima facie* case of guilt against all, it is somewhat distinguishable from a civil action, and seems to call for the exercise of a more guarded discretion on the part of the judge, lest an accomplice in guilt escape through an unfortunate and premature acquittal. The circumstance, that the indictment is found by the grand

(s) *Reg. v. Chasson*, 3 Pugsley, 546.

(t) *Reg. v. Kennedy*, 2 Thomson, 218, per *Wilkins, J.*; *Reg. v. Hambly*, 16 U. C. Q. B. 617; *Rex v. Owen*, 9 C. & P. 83; *Rex v. O'Donnell*, 7 Cox, 337; Arch. Cr. Pldg. 274.

jury, affords less ground for the suspicion that the party is made a defendant for the purpose of excluding his testimony. (u) In a criminal case, though no evidence appears against one defendant, there is no necessary inference that he was made a defendant for this purpose. (v) Where there is no evidence whatever against one defendant, he should be acquitted at the close of the prosecutor's case ; (w) but it seems this is discretionary with the judge. (x) If there is some evidence, though very slight, against the prisoner, his case must be submitted to the jury. (y)

If, after the close of the prisoner's case, there is no legal evidence of his guilt, it seems the judge would be bound to direct an acquittal. (z) The correct and reasonable rule would appear to be that it is discretionary with the judge to direct an acquittal, if applied for before the close of the prisoner's case ; but that it is obligatory upon him to do so, when the case for the defence is closed, particularly if it appears the prisoner was made a defendant for the purpose of excluding his testimony.

Where, at the close of the case for the Crown, very slight evidence appears against one of two prisoners jointly indicted, the other cannot of right claim that the case of the former be submitted separately to the jury ; but this is discretionary with the judge. The question whether the judge has properly exercised his discretion, or not, cannot be reserved as a point for the consideration of the court. (a) And it is always permissible to the judge to recall any witnesses, and make further inquiries, to meet objections, of course allowing counsel for the defence to cross-examine on such new evidence. (b)

Whenever a co-defendant is ordered to be acquitted, in

(u) *Reg. v. Kennedy*, 2 Thomson, 211, per *Bliss*, J.

(v) *Ibid.* 219, per *Wilkins*, J.

(w) *Reg. v. Hambly*, 16 U. C. Q. B. 617.

(x) *Ibid.* ; *Reg. v. Kennedy*, 2 Thomson, 203.

(y) *Ibid.* ; *Reg. v. Hambly*, *supra*, 625.

(z) *Reg. v. Kennedy*, *supra*.

(a) *Reg. v. Hambly*, 16 U. C. Q. B. 617.

(b) *Reg. v. Jennings*, 20 L. C. J. 291.

anticipation of the general verdict, his credit is left to the jury, how strong soever the bias on his mind may be. (c)

Should the judge refuse to direct an acquittal, for the purpose of evidence of the co-defendant, against whom there appeared neither legal proof nor moral implication, a verdict against the other prisoner would be set aside. (d)

Where two prisoners are jointly indicted for felony, and plead not guilty, but one only is given in charge to the jury, the other is an admissible witness against the one on trial, although the plea of not guilty remains on the record undisposed of; the witness not having been acquitted or convicted, and no *nolle prosequi* having been entered. (e) But notwithstanding 32 & 33 Vic., c. 29, ss. 62 and 63, if both have been given in charge to the jury, neither can be called as a witness. (f)

It is conceived that this decision will hold in Ontario at least, as the Evidence Act here, Con. Stats. U. C. c. 32, s. 18, only protects a party in criminal proceedings from giving evidence for or against himself. It is also unaffected by the R. S. O., c. 62.

Parties separately indicted for perjury alleged to have been committed at one and the same hearing, can be witnesses for or against each other. (g)

Where four prisoners were indicted together for robbery, and one severed, in his challenges, from the other three, who were tried first; it was held that the former, although not actually upon his trial, after pleading not guilty, and before trial or judgment, was a competent witness on their behalf. (h) He would also be competent for the Crown. (i)

It would seem that, in any case, one prisoner, whether he pleads guilty or not guilty, may, if he severs in his chal-

(c) *Reg. v. Kennedy*, 2 Thomson, 219-20, per *Wilkins*, J.

(d) *Ibid.* 220, per *Wilkins*, J.

(e) *Winsor v. Reg.*, L. R. 1 Q. B. 390 (Ex. Chr.); 35 L. J. (M. C.) 161.

(f) *Reg. v. Payne*, L. R. 1 C. C. R. 349.

(g) *Reg. v. Pelletier*, 15 L. C. J. 146; 1 *Revue Leg.* 565.

(h) *Reg. v. Jerrett*, 22 U. C. Q. B. 499.

(i) *Ibid.* 500, per *Hagarty*, J.

lenges from the other prisoners, and the Crown elects to proceed against the others first, so that he is not on trial with them, be called for the prosecution ; and this on the ordinary principles of the common law. (j)

In such cases, however, it might be advisable, in order to ensure the greatest possible amount of truthfulness in the person coming to give evidence, to take a verdict of not guilty, as to him, or to have his plea of not guilty withdrawn and a plea of guilty taken and sentence passed, so that the witness may give his evidence with a mind free from all the corrupt influences which the fear of impending punishment, and the desire to obtain immunity to himself at the expense of the prisoner, might otherwise produce. (k) This course cannot, however, be held absolutely necessary, since the decision of this case in the Exchequer Chamber.

As to the competency of witnesses, a child of any age, if capable of distinguishing between good and evil, may be admitted to give evidence.

A child of six years of age was examined, on being interrogated by the judge, and making answers that there was a God, that people would be punished in hell who did not speak the truth, and that it was a sin to tell a falsehood under oath, although he stated he did not know what an oath was. (l)

On a trial for murder, an Indian witness was offered, and on his examination by the judge, it appeared that he had a full sense of the obligation to speak the truth, but he was not a Christian, and had no knowledge of any ceremony, in use among his tribe, binding a person to speak the truth or imprecating punishment upon himself if he asserted what was false. It appeared also that he and his tribe believed

(j) *Reg. v. Jerrett*, 22 U. C. Q. B. 500 *et seq.*, per *Hagarty, J.*; see *Reg. v. King*, 1 Cox, C. C. 232; *Reg. v. George*, C. & Mar. 111; *Reg. v. Williams*, 1 Cox, C. C. 289; *Reg. v. Stewart*, *ibid.* 174; *Reg. v. Gerber*, 1 Temp. & Mew, 647; *Reg. v. Clouter*, 8 Cox, C. C. 237.

(k) *Winsor v. Reg.* L. R. 1 Q. B. 312, per *Cockburn, C. J.*

(l) *Reg. v. Berube*, 3 L. C. R. 212.

in a future state, and in a Supreme Being who created all things, and in a future state of reward and punishment according to their conduct in this life. He was then sworn in the ordinary way on the New Testament, and it was held that his evidence was admissible. (*m*) If the witness had belonged to any nation or tribe that had in use among them any particular ceremony which was understood to bind them to speak the truth, however strange and fantastic the ceremony might be, it would have been indispensable that the witness should have been sworn according to such ceremony; because all should be done, that can be done, to touch the conscience of the witness according to his notions, however superstitious they may be. (*n*)

The defendant, on his trial upon an indictment, cannot give evidence for himself, nor can his wife be admitted as a witness for him. (*o*)

The wife of any one of several prisoners, jointly indicted, stands in the same position with respect to the admissibility of her evidence as her husband. (*p*)

Thus where A. and B. were tried together, on a joint indictment for assault on a peace officer, and the wife of A. was offered, as a witness, to disprove the charge against B.; it was held that her evidence was properly rejected, but had the husband not been on his trial, she would have been a competent witness. (*q*)

But where the prisoner was indicted, among other things, for a conspiracy between himself and E., the wife of T., but E. was not indicted; it was held that the evidence of T. was properly received. (*r*)

A conviction on the evidence of an accomplice would be good in law, if the judge directed the attention of the jury to

(*m*) *Reg. v. Pah-mah-gay*, 20 U. C. Q. B. 195.

(*n*) *Ibid.* 198, per *Robinson*, C. J.

(*o*) *Reg. v. Humphreys*, 9 U. C. Q. B. 337; and see *Reg. v. Madden*, 14 U. C. Q. B. 588.

(*p*) *Reg. v. Thompson*, L. R. 1 C. C. R. 377.

(*q*) *Reg. v. Thompson*, 2 Hannay, 71.

(*r*) *Reg. v. Halliday*, 7 U. C. L. J. 51; Bell, 257; 29 L. J. (M. C.) 148.

the rule of practice, by which the testimony of the accomplice requires corroboration as to the identity of the accused, (s) and it seems even if the judge did not act on this rule, (t) and the testimony of the accomplice were uncorroborated. (u) In a prosecution for selling liquor on a Sunday, the persons who purchased the liquor, though accomplices of the accused, were held competent witnesses to prove the selling. (v)

Judges, in their discretion, will advise a jury not to convict a prisoner upon the testimony of an accomplice alone without corroboration, and the practice of giving such advice is now so general that its omission would be deemed a neglect of duty on the part of the judge. (w) The direction of the judge should be so strongly against the testimony, if uncorroborated, as almost to amount to a direction to acquit. (x)

In *Reg. v. Seddons*, (y) the jury were told that the testimony of the accomplice was not sufficiently corroborated to warrant a conviction, whereupon they came into court stating that they thought the prisoner guilty, but that he ought not to be convicted on the evidence. They were then told that they ought to acquit; but, after a short interval, they returned a verdict of guilty. Before recording their finding, the presiding judge recommended them not to convict on the evidence, saying, however, they could do so if they thought proper. They nevertheless adhered to their verdict, and the court held that there was neither error, nor misconduct in fact, nor in law.

The nature and extent of the corroboration that should be required will depend a great deal upon the character of the crime. And on the trial of a charge of scuttling, a direction to the jury that it was not necessary that the accomplice should

(s) *Re Caldwell*, 6 C. L. J. N. S. 228; 5 U. C. P. R. 221; per *A. Wilson*, J.; *Reg. v. Seddons*, 16 U. C. C. P. 389; *Reg. v. Tower*, 4 Pugsley & B. 168.

(t) *Reg. v. Charlesworth*, 9 U. C. L. J. 53, per *Blackburn*, J.

(u) *Reg. v. Fellowes*, 19 U. C. Q. B. 51; *et seq.* per *Robinson*, C. J.; *Reg. v. Beckwith*, 8 U. C. C. P. 274.

(v) *Ex parte Birmingham*, 2 Pugsley & B. 564.

(w) *Reg. v. Beckwith*, *supra*, 279, per *Draper*, C. J.

(x) *Reg. v. Seddons*, *supra*, 394, per *A. Wilson*, J.

(y) *Supra*.

be corroborated as to the very act of boring the holes in the vessel, if the other evidence and circumstances of the case satisfied them that he was telling the truth in his account of its destruction. (z)

In *Beckwith's case*, the corroborative evidence did not affect the identity of the accused; it did not show that he was the guilty party; and it might be said only to concur with the testimony of the accomplice, as to the manner in which the crime was committed. The learned judge (*Draper, C. J.*) adverted to the fact that there had been a departure from that which the authorities show is a well settled practice, as to the manner in which the testimony of an accomplice is left to the jury; and he regretted that there should be an omission to submit his evidence to the jury coupled with a caution, which the practice and authority of the most eminent judges in England recommend. But he considered that the alleged misdirection was in a matter of practice, and that, on the authority of *Reg. v. Stubbs*, (a) it could not be treated as a point of law, nor was it a question of fact, and a rule nisi obtained for a new trial, under Con. Stats. U. C., c. 113, was therefore discharged. It must be recollected, in considering these reasons of the learned judge, that the application was made under the above statute, and the court was then of opinion the only grounds it opened up was "upon any point of law or question of fact." (b)

The rule that the evidence of an accomplice requires corroboration is not a rule of law, but of general and usual practice, the application of which is for the discretion of the judge by whom the case is tried, and in its application much depends upon the nature of the offence, and the extent of the complicity of the witness in it; (c) and it has been doubted

(z) *Reg. v. Tower*, 4 Pugsley & B. 168.

(a) *Dears*, 555; 1 Jur. N. S. 1115; 25 L. J. (M. C.) 16.

(b) See the judgment in this case.

(c) *Reg. v. Seddons*, 16 U. C. C. P. 394, per *A. Wilson, J.*; *Reg. v. Boyes*, 1 B. & S. 320, per *Wightman, J.*

whether an accessory, after the fact is so far involved with the principal offender as to come within the rule. (*d*)

The evidence of an incompetent witness may be withdrawn from the jury, upon his incompetency appearing during his examination in chief, although he has been examined previously on the *voir dire*, and pronounced to be competent. (*e*) So illegal evidence allowed to go to the jury, under a reserve of objection, may be subsequently ruled out by the judge in his charge, and the conviction is not invalidated thereby, if it does not appear that the jury were influenced by such illegal evidence. (*f*)

One witness is in general sufficient to establish the charge on an indictment. Neither statute nor any principle of the common law requires the testimony of a second witness except in cases of treason and perjury. (*g*)

A barrister or attorney is not compellable to disclose confidential communications made to him by his client; but this protection does not extend to physicians or clergymen. (*h*)

At common law, a witness is entitled to refuse to answer questions that may tend to criminate him; not only because the answer itself might be evidence against him on a criminal charge, but because it might form a link in the chain of testimony which might implicate him in such charge. (*i*) A witness is not compellable to answer any question tending to subject him to a penalty or a forfeiture of any nature. (*j*) Questions tending to destroy his defence must be regarded as tending to subject the witness to a penalty. (*k*) If the witness declines answering, no inference of the truth of the fact can be drawn from that circumstance. (*l*) And it seems he

(*d*) *Reg. v. Smith*, 38 U. C. Q. B. 218.

(*e*) *Reg. v. Whitehead*, L. R. 1 C. C. R. 33; 35 L. J. (M. C.) 186.

(*f*) *Reg. v. Fraser*, 14 L. C. J. 245.

(*g*) *Reg. v. Fellowes*, 19 U. C. Q. B. 51, per *Robinson*, C. J.

(*h*) *Browne v. Carter*, 9 L. C. J. 163.

(*i*) *Reg. v. Hulme*, L. R. 5 Q. B. 384, per *Blackburn*, J.

(*j*) *Burton q. t. v. Young*, 17 L. C. R. 379; and see Arch. Cr. Pldg. 279; Taylor on Evid. 1222-1236 (4th ed.); 3 Russ. Cr. 540.

(*k*) *Burton q. t. v. Young*, 17 L. C. R. 392, per *Meredith*, J.

(*l*) *Ibid.*

is not bound, in order to claim the privilege, to state his belief that his answering would tend to criminate him. (*m*)

It, however, appears now to be settled that for the purpose of impeaching the credit of a witness, he may always be asked on cross-examination questions with regard to alleged crimes or other improper conduct on his part. (*n*)

And questions relating to collateral facts may be put to a witness for this purpose, as showing his interest, motives and prejudices, such as whether he had not declared that no Roman Catholic should sit on the jury ; whether he had not been constantly advising with the Attorney General as to which of the jurors should be ordered to stand aside ; and whether it was not his desire, as a member of the Government, to procure a conviction. (*o*)

It has been held that if a witness intends to insist on his right to refuse answering any question tending to subject him to a penalty, he must do so at once ; if he answers part, he must answer all. (*p*) As where a witness, called to prove that the consideration of a note was usurious, declined to state what amount he gave on discounting the note, because his answer might render him liable to a penalty, but on cross-examination said that he gave what he thought it was worth, the court held that he was bound in re-examination to state what he gave, on the ground that having answered part, he was bound to answer the whole. (*q*) But it is elsewhere laid down that the witness may claim the protection of the court at any stage of the inquiry ; although he may have already answered, without objection, some questions tending to criminate him. (*r*)

Upon the trial of the defendant for bribery, a witness was called upon to give in evidence the receipt of a bribe by him from the defendant. Upon his objecting to answer, on the

(*m*) *Ellis v. Power*, 4 Pugsley & B. 40.

(*n*) See also 32 & 33 Vic., c. 29, s. 65.

(*o*) *Reg. v. Chasson*, 3 Pugsley, 546.

(*p*) *Peters v. Irish*, 4 Allen, 326.

(*q*) *Ibid.*

(*r*) *Reg. v. Garbett*, 2 C. & K. 474 ; Arch. Cr. Pldg. 279.

ground that his answer would criminate himself, a pardon, under the Great Seal, was offered, and accepted by him; but he still refused to answer, on the same ground. It was held that, as the pardon protected the witness against every proceeding, except an impeachment by the House of Commons, and as there was no probability whatever, under the circumstances of the case, that the witness would ever be subjected to such a proceeding, for the matter which he was called upon to give in evidence, he was not privileged from answering; and that the judge was bound to compel the witness to answer. (s)

A witness may now be cross-examined as to previous statements made by him, in writing, or reduced into writing, relative to the subject-matter of the case, without such writing being shown to him. But sec. 64 of the 32 & 33 Vic., c. 29, has no application to papers which it does not appear the witness had either written, signed or seen until shown to him in the witness box. (t) It is competent, however, it seems, for counsel, on cross-examination of the witness, to put into his hands a paper, such as a policy of insurance, not in evidence, and ask him if he did not see certain words in it; also to read from a paper purporting to be a protest made by the prisoner, and to ask the witness if he did not write the protest. But he could not read from such a paper and found a question on it. (u)

A question should not be put to a witness, in cross-examination, for the mere purpose of contradicting him, unless such question is relevant to the matter in issue; but if an irrelevant question be put, the answer is conclusive; (v) for, otherwise, the court would be involved in the trial of innumerable issues, totally unconnected with the matter under

(s) *Reg. v. Boyes*, 8 U. C. L. J. 139; 2 F. & F. 157; 1 B. & S. 311; 30 L. J. (Q.B.) 301.

(t) *Reg. v. Tower*, 4 Pugsley & B. 168.

(u) *Ibid.*

(v) *Gilbert v. Gooderham*, 6 U. C. C. P. 39; *Reg. v. Brown*, 21 U.C.Q.B. 334, per Robinson, C. J.

investigation, (w) and which the parties would not be prepared to meet. (x)

On an indictment for rape, or attempt at rape, or for an indecent assault, amounting in substance to an attempt at rape, if the prosecutrix is asked, in cross-examination, whether she has had connection with another person, not the prisoner, evidence cannot be called to contradict her. (y)

Now, however, by the 32 & 33 Vic., c. 29, s. 65, if a witness, on being questioned as to whether he has been convicted of any felony or misdemeanor, either denies the fact, or refuses to answer, the opposite party may prove such conviction.

By section 69, if a witness, upon cross-examination as to a former statement made by him, relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did, in fact, make it.

In order to impeach the character of a witness for veracity, persons may be called to prove that his general reputation is such that they would not believe him on his oath. (z) In cross-examining the witness for this purpose, counsel is not obliged to explain the object of his questions, because that might often defeat his object. (a)

By the 32 & 33 Vic., c. 29, s. 68, in case a witness, in the opinion of the court, proves adverse, the party producing him may contradict him by other evidence, or, by leave of the court, may prove that the witness made, at other times, a statement inconsistent with his present testimony; but, before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness,

(w) *Reg. v. Brown*, 21 U. C. Q. B. 334, per *Robinson*, C. J.

(x) *Reg. v. Holmes*, L. R. 1 C. C. R. 334.

(y) *Ibid.*; *Rex v. Hodgson*, R. & R. 211; *Reg. v. Cockcroft*, 11 Cox, 410.

(z) *Reg. v. Brown*, L. R. 1 C. C. R. 70; 36 L. J. (M. C.) 59.

(a) *Reg. v. Brown*, 21 U. C. Q. B. 334, per *Robinson*, C. J.

and he must be asked whether or not he did make such statement. (b)

A witness should be interrogated as to facts only, and not as to matter of law. (c)

A skilled witness cannot, in strictness, be asked his opinion respecting the very point which the jury are to determine; but he may be asked a hypothetical question, which, in effect, will decide the same thing. (d)

Where, on a trial for murder, the Crown having made out a *prima facie* case by circumstantial evidence, the prisoner's daughter, a girl of fourteen, was called on his behalf, and swore that she herself killed the deceased, by two blows with a stick, about two feet long, and one and a half inches thick. In answer to this, a medical man, previously examined on the part of the Crown, was recalled, and asked whether the blows so inflicted by the prisoner's daughter would produce the fractures that were found on the head of the deceased. This question having been allowed, the answer was: "A stick such as she describes, one inch or an inch and a half in thickness, and two feet long, could not, in my opinion, produce such extensive fractures by two blows; there must have been a greater number of blows to produce such fractures. There were bruises on both arms, head and legs, and two blows could not have done all that. Deceased must have had a succession of blows from a larger instrument than the girl describes." It was objected that this was skilled evidence and matter of opinion, when skilled evidence and matter of opinion were not admissible; but the court held that the rule excluding a skilled witness from giving evidence on the point which the jury are to determine was not infringed, and that the medical testimony was material to enable the jury to determine the true cause of death; (e) and also that this was not an informal or illegal

(b) *Reg. v. Jerrett*, 22 U. C. Q. B. 499.

(c) *R-g. v. Massey*, 13 U. C. C. P. 484.

(d) *Reg. v. Jones*, 28 U. C. Q. B. 422, per *Richards*, C. J.

(e) *Ibid. supra*, 416.

way of impeaching the veracity of the prisoner's daughter, nor was the evidence collateral to the fact of killing, but was important, as testing the credibility of the witness. (*f*)

By the 32 & 33 Vic., c. 29, s. 67, it is provided that comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses; and it has been held under this section that the signature of a person was properly proved by comparing it with an endorsement on a promissory note, purporting to be his but not proved to be so, otherwise than by the fact that the prisoner had endorsed the note below such signature. (*g*) But it may be doubted whether such a lax mode of proving handwriting was contemplated by the legislature.

It is a general and well-established principle that the confession of a prisoner, in order to be admissible, must be free and voluntary. Any inducement to confess held out to the prisoner by a person in authority, or any undue compulsion upon him, will be sufficient to exclude the confession. The rule is carried so far that, if an oath is administered to the prisoner, while being examined under the 32 & 33 Vic., c. 30, s. 31, the oath will be a sufficient constraint or compulsion to render his statement inadmissible. (*h*) The reasons for this are, the statements made on his examination are regarded as confessions which must be voluntary, and a statement under oath is not so regarded; secondly, a prisoner shall not be compelled to criminate himself, and to this it may be added, that it is harsh and inquisitorial, and for that reason should be rejected. (*i*)

This rule, however, only applies to the time during which the prisoner is under examination, as a prisoner on a charge against himself. His deposition, on oath, as a witness

(*f*) *Reg. v. Jones*, 28 U. C. Q. B. 416.

(*g*) *Reg. v. Tower*, 4 Pugsley & B. 168, *Weldon, J., dissentiente*.

(*h*) *Reg. v. Field*, 16 U. C. C. P. 98.

(*i*) *Reg. v. Field, supra*, 101, per *Richards, C. J.*

against another person, when voluntarily made, with the privilege of refusing to answer criminatory questions, is admissible against himself, if subsequently charged with a crime, and this even though he have not been cautioned to that effect. (j)

The prisoner was convicted of arson. His admission or confession was received in evidence, on the testimony of the constable, who said that, after the prisoner had been in a second time before the coroner, he stated there was something more he could tell, whereupon the constable cautioned him not to say what was untrue. He then confessed the charge. The constable did not recollect any inducement being held out to him. There was also evidence that, on the third day of his incarceration, he expressed a wish to the coroner to confess, on which the latter gave him the ordinary caution, that anything he said might be used against him, and not to say anything unless he wished. He then made a second statement, and after an absence of a few minutes, returned and made a full confession. It was held that, on these facts appearing, the statement made to the constable was *prima facie* receivable, and that the judge was well warranted in receiving as voluntary the confession made to the coroner, after due warning by him.

To make this good evidence to go to the jury, it would seem, however, that the more reasonable rule is, that, notwithstanding the caution of the magistrate, it is necessary, in the case of a second confession, not merely to caution the prisoner not to say anything to injure himself, but to inform him that the first statement cannot be used against him; and if, in such case, the prisoner, after he has been cautioned, and his mind impressed with the idea that his prior statement cannot be used against him, still thinks fit to confess, the latter declaration is admissible.

In the same case, it afterwards appeared that the prosecutor had offered direct inducements to the prisoner to con-

(j) *Reg. v. Field*, 16 U. C. C. P. 101, per *Richards*, C. J.; *Reg. v. Coote*, 18 L. C. J. 103.

fess—promising to get up a petition in his favor, etc.—and the court held that, if the judge was satisfied that the promise of favor thus held out had induced the confession, and continued to act in the prisoner's mind, notwithstanding the warning of the coroner, he was right in directing the jury to reject them. If, in the course of the examination of the witnesses for the prosecution, the judge had suspected the confession had been obtained by undue influence, that suspicion ought to have been removed before the evidence was received. (*k*)

A confession made by the prisoner to the prosecutor in the presence of the police inspector, immediately after the prosecutor had said to the prisoner, "The inspector tells me you are making house-breaking implements; if that is so, you had better tell the truth, it may be better for you," was held inadmissible. (*l*)

So where the prisoner, implicated with several others in a Fenian conspiracy, went before a magistrate, at the request of a constable to whom he had previously made admissions tending to criminate himself, and laid an information against his fellows, saying, "I came to save myself;" and no caution was given on this occasion, nor was any charge preferred against him until afterwards on his refusing to prosecute, when he was arrested, tried, and convicted, his own information being put in evidence against him; the court held such admissions improperly received. (*m*)

This case does not affect the position that the voluntary deposition of a witness, on oath, is admissible against him when subsequently charged with a crime. (*n*)

Section 32 of 32 & 33 Vic., c. 30, is only directory, so that a voluntary statement, made by a prisoner in the presence of a magistrate, as provided for by that Act, is admissible in evidence, although the statement was not taken down in

(*k*) *Reg. v. Finkle*, 15 U. C. C. P. 453.

(*l*) *Reg. v. Fennell*, L. R. 7 Q. B. D. 147.

(*m*) *Reg. v. Gillis*, 14 W. R. 845; and see *Hall's case*, 2 Leach, C. C. 559; 3 Russ. Cr. 373.

(*n*) *Reg. v. Goucie*, 1 Pugsley & B. 611.

writing, and no caution was given by the magistrate to the effect prescribed by s. 31, provided it appear that the prisoner was not induced to make the statement by any promise or threat. (o)

Confessions to a constable, by an accused in his custody, were not admitted where the accused might be under the influence of hopes held out; but admissions made the same day, to a physician, in the absence of the constable, were admitted. (p)

Statements made by a prisoner to parties who arrested him, he having been previously told on what charge they arrested him, are evidence. (q)

Words importing only advice on moral grounds, as by a master to his pupil, do not render a statement inadmissible against the prisoner. (r)

And where the prisoners, two children, one aged eight and the other a little older, were tried for attempting to obstruct a railway train, and it was proved that the mothers of the prisoners and a policeman being present, after they had been apprehended on suspicion, the mother of one of the prisoners said, "You had better, as good boys, tell the truth," whereupon both the prisoners confessed; it was held that this confession was admissible in evidence against the prisoners. (s)

A confession is admissible in evidence made to one in authority, although the prisoner was, immediately before such confession, in the custody of another person not produced, and although it is not shown that such person did not hold out a threat or inducement; for it is unnecessary, in general, to do more than negative any promise or inducement held

(o) *Reg. v. Strip*, 2 U. C. L. J. 137; *Dears*. 648; 25 L. J. (M. C.) 109; *Reg. v. Goucie*, *supra*; *Reg. v. Sansome*, 1 Den. 545; 19 L. J. (M. C.) 138; *Arch. Cr. Pldg.* 228.

(p) *Reg. v. Berube*, 3 L. C. R. 212.

(q) *Reg. v. Tufford*, 8 U. C. C. P. 81.

(r) *Reg. v. Jarvis*, L. R. 1 C. C. R. 96; and see *Reg. v. Baldry*, 2 Den. C. C. 430.

(s) *Reg. v. Reeve*, L. R. 1 C. C. R. 362; and see *Reg. v. Parker*, 8 U. C. L. J. 139; L. & C. 42; 30 L. J. (M. C.) 144.

out by the person to whom the confession was made. If, however, there be any probable ground to suspect collusion in obtaining the confession, such suspicion, it is said, ought in the first instance to be removed. (*t*)

It may be generally laid down that, though an inducement has been held out by an officer or prosecutor or the like, and, though a confession has been made in consequence of such inducement, still if the prisoner be subsequently warned, by a person in equal or superior authority, that what he may say will be evidence against himself, or that a confession will be of no benefit to him, or if he be simply cautioned by the magistrate not to say anything against himself, any admission of guilt, afterwards made, will be received as a voluntary confession. More doubt may be entertained as to the law, if the promise has proceeded from a person of superior authority, as a magistrate, and the confession is afterwards made to the inferior officer; because a caution from the latter person might be insufficient to efface the expectation of mercy, which had been previously raised in the prisoner's mind. (*u*)

It is for the judge to decide whether the prisoner has been induced to confess by undue influence or not. (*v*)

The jury are not bound to believe the whole statements of a prisoner, in making a confession. The exculpatory as well as the implicative portions thereof should be left to the jury, and they must exercise their own judgment as to whether they believe the whole, or only a part. (*w*)

The correct course to be taken by the judge, when evidence has been received which it is afterwards shown not to be properly receivable, is to treat it as if it had been inadmissible in the first instance, and the most effectual way of doing this is to tell the jury not to consider the inadmissible evidence, and to dispose of the case on the other evidence.

(*t*) *Reg. v. Finkle*, 15 U.C.C.P. 455, per *Richards*, C.J.; *Phillips on Evid.* 430; and see *Reg. v. Clewes*, 4 C. & P. 221.

(*u*) *Reg. v. Finkle*, 15 U. C. C. P. 457, per *Richards*, C. J.

(*v*) *Ibid.* 453; *Reg. v. Garner*, 1 Den. C. C. 329.

(*w*) *Reg. v. Jones*, 28 U. C. Q. B. 416.

A similar principle is acted on when the names of other prisoners are mentioned in confession, and the proper course seems to be to read the names in full, the judge directing the jury not to pay any attention to them. (x)

But the inclination of the courts is not to extend the rule for excluding confessions; (y) and where a prisoner is willing to make a statement, it is the magistrate's duty to receive it.

Examinations taken before a commissioner in bankruptcy are admissible in evidence against the prisoner on a criminal charge. (z)

The 66th section of the statute declares that the several forms given in the schedule, or forms to the like effect, shall be good, valid and sufficient in law. The form N., of the statement of the accused before the magistrate, contains the cautions specified in s. 31, and not that in s. 32. Therefore, a statement returned, purporting to be signed by the magistrate, and bearing, on the face of it, the caution provided for by s. 31, is admissible by virtue of s. 34, without further proof. (a)

The object of taking depositions, under the 32 & 33 Vic., c. 30, is not to afford information to the prisoner, but to preserve the evidence, should any of the witnesses be unable to attend the trial, or die. This being the ground on which they are taken, until recently the prisoner had no right to see them. (b) Now he is entitled to inspect the depositions, that he may know why he is committed. (c) It is not incumbent on the prosecution to abstain from giving any additional evidence, discovered subsequently to the taking

(x) *Reg. v. Finkle*, 15 U. C. C. P. 459, per *Richards*, C. J. ; *Rez v. Jones*, 4 C. & P. 217 ; *Rez v. Mandesley*, 2 Lew. C. C. 73.

(y) *Reg. v. Finkle*, 15 U. C. C. P. 459.

(z) *Reg. v. Robinson*, L. R. 1 C. C. R. 80.

(a) *Ibid.* ; see *Reg. v. Bond*, 1 Den. 517 ; 19 L. J. (M. C.) 138 ; Arch. Cr. Pldg. 228.

(b) *Reg. v. Hamilton*, 16 U. C. C. P. 364, per *Richards*, C. J.

(c) *Ibid.* ; 32 & 33 Vic., c. 29, s. 46.

of depositions; but it is only fair that the prisoner's counsel should be apprised of the character of such evidence. (*d*)

It would seem that depositions taken before a coroner can only be proved by the coroner himself, or by proving his signature thereto, and showing by his clerk, or by some person who was present at the inquiry, that the forms of law have been duly complied with. (*e*)

But depositions made and signed by a party at an inquest may be received in evidence to contradict him, whether the inquest was illegally taken or not, as being statements of a witness made on a previous occasion. (*f*)

It was not, however, necessary to prove depositions by the magistrate or his clerk, when taken before justices of the peace; though it was intimated that in important cases it would be better if they were present at the trial. (*g*) And now, an examination taken under the 32 & 33 Vic., c. 30. may be given in evidence without further proof, unless it be proved that the justice purporting to have signed the same did not in fact sign it. (*h*) The signature of the prisoner is not absolutely necessary. The effect of the statute, so far as regards the evidence of a confession, seems to be that a written examination, taken as the statute directs, is evidence *per se*, and the only admissible evidence of the deponents having made a declaration of the things therein contained. (*i*)

The statute authorizes the reading of the depositions before the grand jury, for the purpose of finding a bill, as well as before the petty jury at the trial. (*j*) In order, however, that the deposition may be admissible before the grand jury, the presiding judge must, by evidence taken in the presence of the accused, satisfy himself of the ex-

(*d*) *Reg. v. Hamilton*, 16 U. C. C. P. 365, per *Richards*, C. J.

(*e*) *Reg. v. Hamilton*, *supra*, 340; *Taylor on Evid.* 473; *Reg. v. Wilshaw*, C. & Mar. 145.

(*f*) *Reg. v. Chasson*, 3 Pugsley, 546.

(*g*) *Reg. v. Hamilton*, *supra*, 353, per *Richards*, C. J.

(*h*) Sec. 34.

(*i*) *Arch. Cr. Pldg.* 233.

(*j*) *Reg. v. Clements*, 2 Den. 251; 20 L. J. (M. C.) 193.

istence of the facts required by the statute to make such deposition admissible in evidence. (*k*)

Under the 32 & 33 Vic., c. 30, s. 29, it is not necessary that each deposition should be signed by the justice taking it. Therefore, where a number of depositions, taken at the same hearing on several sheets of paper, were fastened together, and signed by the justices taking them once only at the end of all the depositions, in the form given in the schedule (M), it was held that one of the depositions was admissible in evidence, under s. 30 of this Act, after the death of the witness making it, although no part of it was on the sheet signed by the justice. (*l*)

A deposition, properly taken, under 32 & 33 Vic., c. 30 s. 30, before a magistrate, on a charge of feloniously wounding, is admissible in evidence against the prisoner on his trial for murder, the deponent having subsequently died of the wound.

Formerly depositions were receivable only where the indictment was substantially for the same offence as that with which the defendant was charged before the justice: (*m*) but now by the 32 & 33 Vic., c. 29, s. 58, depositions taken in the preliminary or other investigation of any charge against any person, may be read as evidence in the prosecution of such person for any other offence whatsoever.

Pregnancy may create such an illness as will render depositions receivable in evidence. (*mm*) But the illness must be such as to render the witness unable to travel. And where a woman 74 years of age, whose depositions were sought to be read, lived near the court house, but her medical adviser swore that, although able to travel the distance, it

(*k*) *Reg. v. Beaver*, 10 Cox, 274, per *Byles*, J. ; Arch. Cr. Pldg. 250.

(*l*) *Reg. v. Parker*, L. R. 1 C. C. R. 225 ; 39 L. J. (M. C.) 60 ; *Reg. v. Richards*, 4 F. & F. 860, overruled.

(*m*) See *Reg. v. Beeston*, 1 U. C. L. J. 17 ; Dears. 405 ; *Reg. v. Ledbetter*, 3 C. & K. 108.

(*mm*) *Reg. v. Stevenson*, 9 U. C. L. J., 139 ; L. & C. 165 ; 31 L. J. (M. C.) 147 ; *Rez v. Wellings*, L. R. 3 Q. B. D. 428 ; see, however, *Reg. v. Welton*, 9 Cox, 296.

would be dangerous for her to see so many faces, or to be examined at all, the court held that her depositions were not admissible. (n)

It seems the statement of a deceased witness is admissible in evidence, though it is headed "the complaint of," etc., instead of "the examination" of the deceased, and does not state, on its face, to have been taken in the presence of the accused, it being proved that it was taken in his presence. (o)

The 43 Vic., c. 35, makes provision for the taking of depositions of any person dangerously ill, who is able to give material evidence in a criminal proceeding, for the purpose of having the same read at the trial, in the event of such person being then dead or unable to attend.

Where several felonies are connected together and form part of one entire transaction, evidence of one is admissible to show the character of the others. (p)

But where a prisoner indicted for murder, committed while resisting constables about to arrest him, had with others been guilty of riotous acts several days before, it is doubtful if evidence of such riotous conduct is admissible, even for the purpose of showing the prisoner's knowledge that he was liable to be arrested, and therefore had a motive to resist the officers. (q)

And where, on an indictment for riot and unlawful assembly on the 15th January, evidence was given on the part of the prosecution of the conduct of the prisoners on the day previous, for the purpose of showing (as was alleged) that the prosecutor, in whose office one act of riot was committed, had reason to be alarmed when the prisoners came to his office; and the prisoners thereupon claimed the right to show that they had met on the 14th to attend a school meeting and to give evidence of what took place thereat; it was held

(n) *Reg. v. Farrell*, L. R. 2 C. C. R. 116.

(o) *Reg. v. Millar*, Sup. Ct. N. B. H. T. 1861; 5 Allen, 87.

(p) *Clark v. Stevenson*, 24 U. C. Q. B. 209; *Reg. v. Egerton*, Russ. & Ry. C. C. 375; *Rex v. Ellis*, 6 B. & C. 145; *Reg. v. Chasson*, 3 Pugsley, 546.

(q) *Reg. v. Chasson*, *supra*.

that as the conduct of the prisoners on the 14th could not qualify or explain their conduct on the following day, the evidence was properly rejected. (r)

So, where upon an indictment for obtaining money by false pretences, it appeared that the defendant was employed to take orders for goods, but had no authority to receive the price, and that, eleven days after he was so employed, he obtained the money from a customer, by representing that he was authorized by his employer to receive it for goods delivered, in pursuance of an order which the defendant had taken; evidence of an obtaining by a similar representation from another person, within a few days of the time when the moneys on which the indictment was found were obtained, was held inadmissible. (s)

But witnesses may be called, on the part of the Crown, to speak to facts having no immediate connection with the case under trial, for the purpose of showing the motives of the prisoners, (t) as, for instance, to prove that when the stolen goods mentioned in the indictment were found in the possession of the prisoner, there were found also in his possession various other articles that can be shown to have been recently stolen from other people. So, in the case of persons who have passed counterfeit money or bills, when it is necessary to establish a guilty knowledge on the part of the prisoner, the prosecutor is allowed to give evidence of the prisoner having, about the same time, passed other counterfeit money or bills, or had many such in his possession, even though of a different denomination; (u) which circumstances tend strongly to show that he was not acting innocently, and had not taken the money casually, but that he was employed in fraudulently putting it off. (v)

So a false and fraudulent statement to a pawnbroker, that

(r) *Reg. v. Mailloux*, 3 Pugahey, 493.

(s) *Reg. v. Holt*, 8 U. C. L. J. 55; Bell, 280; 30 L. J. (M. C.) 11.

(t) *Reg. v. Mailloux*, 3 Pugahey, 493.

(u) *Reg. v. Foster*, 1 U. C. L. J. 156.

(v) *Reg. v. Brown*, 21 U. C. Q. B. 335, per Robinson, C. J.

a chain offered as a pledge is of silver, is indictable under the 7. & 8 Geo. IV., c. 29, and, upon the trial of such an indictment, evidence is admissible of similar misrepresentations made to others about the same time, and of the possession of a considerable number of chains of the same kind. (w)

And where the offence has been proved, slight proof will let in documentary evidence for confirmatory purposes. Thus on an indictment for false pretences, by inserting with intent to defraud an advertisement in a newspaper containing false statements, and receiving money thereby, where it was proved that several letters had been found on the person of the prisoner, bearing the address mentioned in the advertisement, and containing postage stamps to the amount indicated therein, other letters similarly addressed, and containing stamps to the same amount, but which had been stopped by the postal authorities, were received as evidence without proof that they had been written by the parties by whom they purported to have been sent. (x)

A declaration by a subscribing witness (who was dead) to a deed, that he left the country because he had forged a name thereto, is not admissible, on the ground that it is hearsay evidence. (y). And evidence of an extra-judicial confession of the sister of a prisoner, tending to prove fraud between them, is objectionable on the same ground. (z)

But the description given by a person of his sufferings, whilst laboring under disease and pain, has been held not to be hearsay evidence. (a)

When the prisoner was indicted for setting fire to his own house, it was held that his verbal admissions that the house was insured were sufficient to prove that fact, though the policy was not produced, nor its non-production accounted for. (b)

(w) *Reg. v. Roebuck*, 2 U. C. L. J. 138; *Dears. & B.* 24; 25 L. J. (M.C.) 101; and see *Reg. v. Francis*, L. R. 2 C. C. R. 128.

(x) *Reg. v. Cooper*, L. R. 1 Q. B. D. 19.

(y) *Ross v. Cuyler*, 27 U. C. Q. B. 270.

(z) *Reg. v. Guay*, 18 L. C. J. 306.

(a) *Reg. v. Berube*, 3 L. C. R. 212; *sed quære*.

(b) *Reg. v. Bryans*, 12 U. C. C. P. 161.

Secondary evidence of a document in the prisoner's possession is not admissible unless notice to produce has been served on him. (c) The form of an indictment for perjury does not convey sufficient notice to the prisoner to produce the document to dispense with a notice to produce. (d)

A dying declaration is only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration. (e) Therefore, upon an indictment for using instruments with intent to procure abortion, the dying declaration of the woman was held inadmissible. (f)

The question whether a dying declaration is admissible is for the consideration of the judge who tries the case, but the weight of it is for the jury. (g)

To render the proof of a declaration admissible as a dying declaration, there must be proof that the person who made it was at the time under the impression of almost immediate dissolution, and entertained no hope of recovery.

Vague and general expressions, such as "I will die of it!" "I will not recover!" "It is all over with me!" are insufficient to allow the proof of the declaration of a deceased person. (h) And where a person about to die, on hearing her statement read over to her, altered it, so that, instead of reading "no hope of recovery," it read "no hope *at present*," etc., it was held that her declaration was inadmissible. (i) There must be an unqualified belief in the nearness of death; a belief, without hope, that the declarant is about to die; and the burden of proving the facts that render the declaration admissible is upon the prosecution. (j) But where the deceased by her statements shows emphatically that she has

(c) *Reg. v. Ellworthy*, L. R. 1 C. C. R. 103; 37 L. J. (M. C.) 3.

(d) *Ibid.*; see *Kalar v. Cornwall*, 8 U. C. Q. B. 168.

(e) *Reg. v. Mead*, 2 B. & C. 605, per *Abbott*, C. J.

(f) *Reg. v. Hind*, 7 U. C. L. J. 51; *Bell*, 253; 29 L. J. (M. C.) 147.

(g) *Reg. v. Charlotte Smith*, 13 W. R. 816.

(h) *Reg. v. Peltier*, 4 L. C. R. 3.

(i) *Reg. v. Jenkins*, L. R. 1 C. C. R. 187; L. J. (M. C.) 82.

(j) *Reg. v. Jenkins*, L. R. 1 C. C. R. 192, per *Kelly*, C. B.

abandoned all hope of living, the mere use of the words "If I die" will not alone render her statement inadmissible. (*k*) And if the statement is otherwise receivable, it makes no difference as to its admissibility that the answers were given to leading questions. (*l*)

It is said that dying declarations ought to be admitted with scrupulous and almost superstitious care. They have not necessarily the sanction of an oath; they are made in the absence of the prisoner; the person making them is not subjected to cross-examination, and is in no peril of prosecution for perjury. There is also great danger of omissions and material misrepresentations, both by the declarant and the witness. (*m*) The statements may be incomplete, and, though true as far as they go, may not constitute the whole truth. They may be fabricated, and their truth or falsehood cannot be ascertained; and experience shows that implicit reliance cannot, in all cases, be placed on the declarations of a dying man, for his body may have survived the powers of his mind or his recollection, if his senses are not impaired by pain, or otherwise may not be perfect, or for the sake of ease and to be rid of the importunity of those around him, he may say, or seem to say, whatever they suggest. (*n*)

In a prosecution for selling liquor without license, the person who bought the liquor is a competent witness, (*o*) but it is not necessary that he should be produced. It is sufficient to call a person who saw the sale, and saw what was paid. Nor is it necessary to call the person to whom the liquor was sold to prove that it was "fermented" liquor. A person who tasted the liquor may prove this. (*p*)

A conviction, made by a justice of the peace, when duly returned, according to the statute, to the Court of Quarter Sessions, and filed by the clerk of the peace, becomes a re-

(*k*) *Reg. v. Sparham*; Rob. & Jos. Dig. 929.

(*l*) *Reg. v. Smith*, 23 U. C. C. P. 312.

(*m*) *Reg. v. Jenkins*, L. R. 1 C. C. R. 193, per *Byles*, J.

(*n*) *Re Anderson*, 20 U. C. Q. B. 181, per *McLean*, J.

(*o*) *Ex parte Birmingham*, 2 Pugsley & B. 564.

(*p*) *Thompson and Durnford*, 12 L. C. J. 285.

cord of that court, and may be proved as any other similar record without producing the original. (q)

A conviction by a justice for an assault and battery is a record, and a record of our own country, and so not provable when directly denied by an examined copy, as in the case of a foreign judgment, but by the production of the record itself. The course in such a case is to produce the original record of conviction, which may be made up by the justice at any time, and may be procured upon a writ of *certiorari* from this court, either to the justice or to the Quarter Sessions, if the record has been returned thither. Or, perhaps, it may be produced (when it can be so obtained) without the formality of a writ of *certiorari*.

In case of the death of the justice who made the conviction, the writ may go to his executor. (r)

There is a well-settled distinction between proving the record of a different court, from that in which the evidence is offered, and a record of the same court. A court will look at its own minutes, while sitting under the same commission, when another court would require more formal proof. (s)

The minutes of a Court of General Quarter Sessions are in themselves evidence, in the same court, of the facts therein stated, without any other proof that the matter there recorded took place. Therefore, a recognizance, in a case of bastardy, taken under the Act 2 Vic., c. 42, before the court itself, in open court, is proved by the production of the minutes of the sessions containing the entry. (t)

When a record of acquittal or conviction is produced *nisi prius*, the court cannot inquire into the circumstances under which it is brought forward.

In a case of felony, as well as misdemeanor, a copy of the record of acquittal may be, and indeed must be, received

(q) *Graham v. McArthur*, 25 U. C. Q. B. 484 n.

(r) *Thomson v. Leslie*, 9 U. C. Q. B. 360.

(s) *Neill v. McMillan*, 25 U. C. Q. B. 494, per *Draper*, C. J.

(t) *Ex parte Daley*, 1 Allen, 424.

in evidence when offered, without its being necessary to show that an order of a judge has been obtained, sanctioning the delivery of a copy, though it seems the officer having the custody of the records should not deliver it without an order. (u)

Where a conviction has been returned to the sessions, and filed by the clerk of the peace, but quashed on appeal afterwards made to the sessions, the quashing may be proved by an order under the seal of that court, signed by its clerk, directing that the conviction should be quashed, the conviction itself being in evidence, and the connection between it and the order being shown. (v) After the return of the conviction, it becomes a record, and may be proved as other records.

It is not necessary to make up a formal record of the judgment on the appeal, for the 32 & 33 Vic., c. 31, enables the Court of Quarter Sessions to dispose of the conviction, "by such order as to the court shall seem meet." (w)

It would seem that the minute book of the sessions, having an apparently proper caption, and signed by the clerk of the peace, would not be sufficient proof *per se* of the judgment of the court quashing the conviction without proof of the order following it; but, if the further proof were added that, in practice, no other record is kept or made up, the minute book would be evidence. So the minute book would be evidence as to indictments, verdicts, and judgments in criminal matters, at the sessions. (x)

A conviction, before a police magistrate, can only be proved by the production of the record of the conviction, or an examined copy of it. Where a police magistrate, after hearing a case of common assault, ordered the accused to enter into a recognizance and pay the recognizance fee, but did not order him to be imprisoned, or to pay any fine, it was held

(u) *Lusty v. Magrath*, 6 U. C. Q. B. O. S. 340.

(v) *Neill v. McMillan*, 25 U. C. Q. B. 485.

(w) *Ibid.*

(x) *Neill v. McMillan*, 25 U. C. Q. B. 494, per *Draper*, C. J.

that this was not a conviction within the corresponding English section of the 32 & 33 Vic., c. 20, s. 45; and that even if it were, a statement of the above facts by the magistrate's clerk, without producing a record of the proceedings, was not sufficient proof of its existence. (y)

An information, and other proceedings before a justice of the peace, returned to the Supreme Court with a *certiorari*, and filed with the clerk of the Crown, become a record, and may be proved by an examined copy taken before the originals were filed. (z)

To prove the finding of an indictment at the sessions, it is not sufficient to produce an exemplification of the record of acquittal, without any general heading or caption to it, (a) and it would seem the proper way of proving it is to have the record regularly drawn up, and produce an examined copy. (b)

The production of the original indictment is insufficient to prove an indictment for felony, and a record showing a proper caption must be made up. (c)

A judgment of the Court of Quarter Sessions, affirming a conviction of the defendant, before a magistrate, on a charge of assaulting H. M., "by using insulting and abusive language to him, in his own office and on the public street, and by using his fist in a threatening and menacing manner to the face and head of the said H. M.," is sufficient proof of a breach of the peace. (d)

The court will judicially notice a public statute. (e) By the Interpretation Act, 31 Vic., c. 1, s. 7, thirty-eighthly, every Act shall be deemed to be a public Act, and shall be judicially noticed by all judges, justices of the peace and others,

(y) *Hartley v. Hindmarsh*, L. R. 1 C. P. 553.

(z) *Sewell v. Olive*, 4 Allen, 394.

(a) *Aston v. Wright*, 13 U. C. C. P. 14.

(b) *Ibid.* 19, per *Draper*, C. J.

(c) *Henry v. Little*, 11 U. C. Q. B. 296; *Ree v. Smith*, 8 B. & C. 341; see also on this 32 & 33 Vic., c. 29, s. 77.

(d) *Reg. v. Harmer*, 17 U. C. Q. B. 555.

(e) See *Reg. v. Shaw*, 23 U. C. Q. B. 616.

without being specially pleaded, and all copies of Acts, public or private, printed by the Queen's printer, shall be evidence of such Acts and of their contents, and every copy purporting to be printed by the Queen's printer shall be deemed to be so printed, unless the contrary be shown.

Where an Act of Parliament makes a gazette evidence if it purport to be printed "by the Queen's printer" or "by the Queen's authority," a gazette purporting to be printed by A. B., without giving his style as Queen's printer, and purporting to be printed "by authority," is not receivable. But evidence *aliunde* might be admissible to show that A. B. was the Queen's printer, and that the authority was the Queen's authority. (*f*)

On a charge of murder, threats made by the prisoner to a third person more than six months before the commission of the crime, that the prisoner would take the law into his own hands, are clearly admissible, though there are friendly relations between the parties afterwards, and if undue prominence is given to these threats in the charge of the jury, the prisoner's counsel should call the attention of the court to it, and request that the jury should be told that if there were subsequent acts of kindness and expressions of friendliness, they would raise a presumption of kindness to rebut that of malice. (*g*) The reception of evidence in reply is, as a general rule, in the discretion of the judge, subject to be reviewed by the court. Evidence in explanation of some matter brought out by the prisoner's witnesses, is properly received in reply; (*h*) and witnesses may be recalled for this purpose. (*i*)

According to the strict practice, a party cannot, after closing his case, put in any evidence, unless by permission of the judge. (*j*) And in an action for libel, it was held that the plaintiff could not, after closing his case, have a paper which

(*f*) *Reg v. Wallace*, 2 U. C. L. J. N. S. 138; 10 Cox, 500.

(*g*) *Reg. v. Jones*, 28 U. C. Q. B. 416.

(*h*) *Ibid.*

(*i*) *Reg. v. Sparham*, Rob. & Jos. Dig. 929.

(*j*) *Cross v. Richardson*, 13 U. C. C. P. 433.

he had proved before, read and filed, except in the discretion of the judge trying the case. (k)

Before the 32 & 33 Vic., c. 29, s. 80, did away with the granting of new trials in criminal cases, it was held that the rule is the same in the latter as in civil cases ; at any rate, where the prisoner is defended by counsel, that any objection to the charge of the presiding judge, either for non-direction or for misdirection, must be taken at the trial, when it can be directly cured ; and if not then taken, it cannot be afterwards raised on motion for new trial or otherwise, especially when the evidence fully sustains the verdict ; that non-direction is not an available objection when the verdict is not against evidence, and where the law is clear, it is no misdirection to leave the facts simply to the jury, for they are judges of the evidence ; that misdirection could only be on a point of law, and not on a matter of fact. (l)

The improper reception of evidence upon a criminal trial is not necessarily a ground for quashing the conviction, if the other evidence adduced be amply sufficient to sustain it. (m)

It would seem that, as the law now stands in Canada, when material evidence has been incorrectly admitted or rejected, or the verdict, though regularly obtained, is manifestly contrary to the evidence, the proper remedy for the prisoner is an application to the Crown for a pardon. (n)

A bill of exceptions will not lie in a criminal case. (o) It follows that, on a charge of that nature, a question as to the reception of evidence, or the rulings of the judge thereon, or his directions to the jury, cannot be raised on the

(k) *Cross v. Richardson*, 13 U. C. C. P. 433.

(l) *Reg. v. Fick*, 16 U. C. C. P. 379 ; see also *Cousins v. Merrill*, 16 U. C. C. P. 120.

(m) *Reg. v. Foster*, 1 U. C. L. J. 156.

(n) *Reg. v. Kennedy*, 2 Thomson, 216, per Bliss, J.; *ibid.* 225, per Wilkins, J.

(o) *Whelan v. Reg.* 28 U. C. Q. B. 132, per Draper, C. J.; (in E. & A.) ; *Reg. v. Pattee*, 5 U. C. P. R. 292 ; 7 C. L. J. N. S. 124, per Dalton, J.; *Duval dit Barbinais v. Reg.*, 14 L. C. R. 74, per Meredith, J.; *ibid.* 79, per Duval, C. J. (in error).

record, so as to constitute a ground of error; (p) for the effect of a bill of exceptions is to raise the point excepted to specifically on the record, so as to be subject to revision in error. (q)

An indictment in a criminal prosecution of the defendant is not admissible as evidence in a civil suit against him. (r) And on the trial of an indictment for receiving goods which one M. had feloniously stolen, evidence is not admissible to show that M. had previously been tried for the larceny and acquitted. (s)

The fabrication of evidence by a prisoner, or inducing a witness to swear in his favor, is most damaging to the prisoner's case. (t)

The reading to witnesses of the judge's notes of their evidence, taken on a former trial, should be discouraged. Where, on a second trial, at the same sitting, before another jury, some of the witnesses having been re-sworn, the evidence given by them at the first trial was read over to them from the judge's notes, liberty being given, both to the prosecution and to the prisoner, to examine and cross-examine the witnesses, it was held that this proceeding was irregular, and could not be cured by the consent of the prisoner. (u)

But witnesses may refer to memoranda for the purpose of refreshing their memories. And a witness was allowed to look at a time book, from which he made up the amounts due to the employees of the establishment in which he was pay clerk, for the purpose of proving sums paid to them, though the entries were made by another person. (v)

On a trial for common assault, or when a higher crime is charged but only common assault proved, the prisoner is a

(p) *Winsor v. Reg.* L. R. 1 Q. B. 312, per Cockburn, C. J.

(q) *Duval dit Barbinais v. Reg.* 14 L. C. R. 52.

(r) *Winning v. Fraser*, 12 L. C. J. 291.

(s) *Reg. v. Ferguson*, 4 Pugsley & B. 259.

(t) *Reg. v. Jones*, 28 U. C. Q. B. 416.

(u) *Reg. v. Bertrand*, L. R. 1 P. C. App. 520.

(v) *Reg. v. Langton*, L. R. 2 Q. B. D. 297.

competent witness on his own behalf. (*w*) But on an indictment for an assault occasioning actual bodily harm, the prisoner's evidence is inadmissible. Where the prisoner's evidence is admissible, so also is that of the husband or wife of the prisoner. (*x*)

A prosecution to recover a fine for solemnizing a marriage between minors without the consent of their parents was held a criminal proceeding, so as to render the defendant incompetent to give evidence under the (N. B.) 19 Vic., c. 45. (*y*) But proceedings for the recovery of a penalty, being in the nature of a civil writ, the evidence of the defendant in such cases is admissible under that statute. (*z*)

Instruments liable to stamp duty are, by 41 Vic., c. 10, s. 5, rendered admissible in evidence in any criminal proceeding, though not stamped as by law required.

The 44 Vic., c. 28, provides for the mode of admitting documentary evidence of an official nature.

(*w*) 43 Vic., c. 37.

(*x*) *Reg. v. McDonald*, 30 U. C. C. P. 21.

(*y*) *Ex parte Jarvis*, Stev. Dig. 1289; *Reg. v. Gallart*, 5 Allen, 115.

(*z*) *Ex parte Frank*, 1 Pugsley & B. 277.

CHAPTER IX.

PLEADING.

An indictment grounded upon an offence made by Act of Parliament must, by express words, bring the offence within the substantial description made in the Act. Those circumstances mentioned in the statute to make up the offence shall not be supplied by any general conclusion *contra formam statuti*.

As to indictments in general, the charge must contain such a description of the injury or crime, that the defendant may know what injury or crime it is which he is called upon to answer; that the jury may appear to be warranted in their conclusions of guilt or innocence upon the premises delivered to them; and that the court may see such a definite injury or crime that they may apply the remedy or punishment which the law prescribes. The certainty essential to the charge consists of two parts—the matter to be charged, and the manner of charging it. As to the matter to be charged, whatever circumstances are necessary to constitute the crime imputed must be set out, and all beyond are surplusage. (a)

Where an offence is created by statute, it is the safest rule to describe the offence in the very words used in the statute, and the courts are generally averse to support indictments where other words have been substituted. (b)

Where a statute uses the word “maliciously” in describing an offence, it is not sufficient to allege that it was done “feloniously,” as the former expression is not included in the latter. Where a statute uses the words “wilfully and maliciously,” and the act is laid as done “unlawfully, mali-

(a) *Reg. v. Tierney*, 29 U. C. Q. B. 184-5, per *Morrison*, J.

(b) *Reg. v. Jope*, 3 Allen, 162, per *Carter*, C. J.

ciously, and feloniously," the word " wilfully " being omitted, the indictment is insufficient; for where both the words " wilfully " and " maliciously " are used, they must be understood as descriptive of the offence, and therefore necessary in describing the offence in an indictment. (c) But an allegation that the prisoner did " feloniously stab, cut and wound," instead of did " unlawfully and maliciously," etc., was held good. (d)

It is not sufficient for an indictment to follow the words of a statute where the allegations submit a question of law for the jury to determine. It is not a universal rule that an offence may be described in an indictment in the words of the statute which has created it; for an indictment charging that the defendant falsely pretended certain facts, although in the very language of the statute, was held defective in error, for not averring specifically that the pretences were false. (e)

Where a statute creates a new offence, under particular circumstances, without which the offence did not exist, all these circumstances ought to be stated in the indictment. The prisoner should be able to gather from the indictment whether he is charged with an offence at the common law, or under a statute, or, if there should be several statutes applicable to the subject, under which statute he is charged. (f)

Where the offence charged is created by any statute, or subjected to a greater degree of punishment by any statute, the indictment shall, after verdict, be held sufficient, if it describes the offence in the words of the statute creating the offence or prescribing the punishment, although they be disjunctively stated, or appear to include more than one offence, or otherwise. (g)

It would appear, however, that this does not dispense with the necessity of stating the circumstances under which the

(c) *Reg. v. Jope*, 3 Allen, 162-3, per *Carter*, C. J.

(d) *Reg. v. Flynn*, 2 Pugsley & B. 321.

(e) *Reg. v. Switzer*, 14 U. C. C. P. 477; *Rex v. Perrott*, 2 M. & S. 379.

(f) *Reg. v. Cummings*, 4 U. C. L. J. 188, per *Esten*, V.-C.

(g) *Reg. v. Baby*, 12 U. C. Q. B. 346; 32 & 33 Vic., c. 20. s. 79.

offence was committed, and without which it could not have been committed. (*h*)

There are numerous instances where the statute being disjunctive, a conjunctive statement is commonly used in an indictment. Thus, the statute 7 & 8 Geo. IV., c. 30, enacts that if any person shall unlawfully and maliciously cut, break, or destroy any threshing-machine, the indictment may charge that the accused did feloniously, unlawfully, and maliciously cut, break, and destroy. So, where the offence by statute was unlawfully or maliciously breaking down, or cutting down, any sea bank or sea wall, the indictment may charge a cutting and breaking down. (*i*) And the indictment will not be bad on the ground of its charging several offences.

In indictments for offences against the persons or property of individuals, the Christian and surname of the party injured must be stated, if the party injured be known. (*j*)

So, in an indictment for publishing an obscene book, it is not sufficient to describe it by its title, but the words thereof alleged to be obscene must be set out; and the omission will not be cured by verdict. (*k*)

An indictment charging a person insolvent with making away with and concealing his goods to defraud creditors, must specify what goods and what value. (*l*) And the same ruling would seem to apply at any rate to the second part of section 110 of 32 & 33 Vic., c. 21.

And where the defendant was indicted in the district of Beauharnois for perjury committed in the district of Montreal, but there was no averment in the indictment that the defendant had been apprehended or that he was in custody at the time of the finding of the indictment, the omission was held fatal, and could not be cured by verdict. (*m*)

(*h*) *Reg. v. Cummings*, 4 U. C. L. J. 188, per *Esten*, V.-C.

(*i*) *Reg. v. Patterson*, 27 U. C. Q. B. 145-6, per *Draper*, C. J.

(*j*) *Reg. v. Quinn*, 29 U. C. Q. B. 163, per *Richards*, C. J.

(*k*) *Bradlaugh v. Reg.* L. R. 3 Q. B. D. 607.

(*l*) *Reg. v. Patville*, 4 *Revue Leg.* 131.

(*m*) *Reg. v. Lynch*, 20 L. C. J. 187.

An indictment in the statutory form, charging the prisoner with having feloniously and maliciously set fire to, etc., is good without alleging any intent to injure or defraud; (n) but such an intention must be shown at the trial, (o) and in an indictment for false pretences such an omission would seem to be aided by verdict. (p) So would the omission of the false pretences, (q) if necessary to be alleged. (r)

An indictment charging B. with obtaining by false pretences, from one J. T., two horses with intent to defraud, and that the defendant was present aiding and abetting the said B. the misdemeanor aforesaid to commit, was held good as against the defendant, as charging him as principal in the second degree. (s)

An allegation of the crime having been committed upon the sea instead of upon the high seas, is good in arrest of judgment. (t)

A conviction charging that the prisoner did "unlawfully and maliciously cut and wound one Mary Kelly with intent then and there to do her grievous bodily harm," though insufficient to charge the felony, yet the court, by rejecting the words "with intent" etc., upheld it as a conviction for the misdemeanor. (u) And the omission of the word "company" is cured by verdict. (v)

But the omission of the words "was plaintiff" after the name of the plaintiff, in the description of the style of cause in an assignment of perjury, is fatal, before verdict at least. (w)

If an indictment for stealing certain articles be maintain-

(n) *Reg. v. Soucie*, 1 Pugsley & B. 611; *Reg. v. Cronin*, Rob. & Jos. Dig. 904.

(o) *Reg. v. Cronin*, *supra*.

(p) *Crawford v. Beattie*, 39 U. C. Q. B. 13.

(q) *Reg. v. Goldsmith*, L. R. 2 C. C. R. 74.

(r) See *Reg. v. Lavigne*, 4 R. L. 411, as to necessity of alleging the false pretences.

(s) *Reg. v. Connor*, 14 U. C. C. P. 529.

(t) *Reg. v. Sprungli*, 4 Q. L. R. 110.

(u) *Reg. v. Boucher*, 8 U. C. P. R. 20.

(v) *Reg. v. Foreman*, 1 L. C. L. J. 70.

(w) *Reg. v. Ling*, 5 Q. L. R. 359.

able as to some, the conviction is good, although as to the other goods it cannot be supported. (x)

Surplusage, or the allegation of unnecessary matter, will not vitiate an indictment at common law, or on a statute. The unnecessary allegations need not be proved, and may be rejected, provided they are not matters of description, (y) and do not alter the meaning of the words requisite to define the offence charged. (z) Only material allegations need be proved. (a) And where some counts in an indictment charged the destruction of a vessel with intent to prejudice the underwriters, and some without such intent, and the prisoner was found guilty on all the counts, it was held that, if necessary to show the prisoner had knowledge of the insurance, the court could alter the verdict to a finding on the counts which omitted the alleged intent. (b)

An indictment which charged A. with having made a false declaration, before a justice, that he had lost a pawnbroker's ticket, whereas he had not lost the ticket, but "had sold, lent, or deposited it with one C.," was held not bad for uncertainty, because the words "had sold, lent, or deposited" were surplusage. (c) So the ordinary conclusion of an indictment for perjury, "did wilfully and corruptly commit wilful and corrupt perjury," may be rejected as surplusage. (d)

And an allegation that "having made an assignment" in an indictment against an insolvent for having mutilated his books, is surplusage. (e) So on an indictment for not keeping a bridge in repair, it was held no objection that the proceedings on the record were in the Court of Queen's Bench for the Province of Ontario, there being no such

(x) *Reg. v. St. Denis*, 8 U. C. P. R. 16.

(y) *Reg. v. Bryans*, 12 U. C. C. P. 167, per *Draper*, C. J.

(z) *Reg. v. Bathgate*, 13 L. C. J. 304, per *Drummond*, J.

(a) *Reg. v. Bryans*, *supra*, 169, per *Richards*, C. J.

(b) *Reg. v. Tower*, 4 Pugsley & B. 168.

(c) *Reg. v. Parker*, L. R. 1 C. C. R. 225; 39 L. J. (M. C.) 60.

(d) *Reg. v. Hodgkiss*, L. R. 1 C. C. R. 213, per *Kelly*, C. B.; *Ryalls v. Reg.*, 11 Q. B. 781.

(e) *Reg. v. McLean*, 1 Pugsley & B. 377.

province when they were had; the name of the province being surplusage. (f)

It is a universal principle, which runs through the whole criminal law, that it will be sufficient to prove so much of an indictment as charges the defendant with a substantive crime; (g) and the 32 & 33 Vic., c. 29, s. 23, enacts that no indictment shall be held insufficient for want of the averment of any matter unnecessary to be proved, or for the insertion of the words "against the form of the statute," instead of the words "against the form of the statutes," or *vice versa*, or for the omission of the same.

The general rule was, that, in indictments for offences created by statute, the conclusion "*contra formam statuti*" was necessary. It was pretty clear, however, that, under the old statutes, the omission of these words was not fatal after verdict, though it might, perhaps, have been on demurrer. (h)

The general rule of law is, that no person shall be twice placed in legal peril of a conviction for the same offence. Consequently, on an indictment for any offence, a previous conviction, or acquittal of the same offence, may be a good plea in bar. The true test by which the validity of such a plea may be ascertained is, whether the evidence necessary to sustain the second indictment would have warranted a legal conviction upon the first. (i)

But the prisoner must be in legal peril on the first indictment, and unless the first indictment be such that the prisoner might have been convicted upon it, on proof of the facts contained in the second indictment, an acquittal on the first can be no bar to the second. (j)

Moreover, with reference to these pleas, when it is said

(f) *Reg. v. Desjardin Canal Co.*, 27 U. C. Q. B. 374.

(g) *Reg. v. Bryans*, 12 U. C. C. P. 167, per *Draper*, C. J.

(h) *Reg. v. Cummings*, 16 U. C. Q. B. 15; confirmed on appeal, 4 U. C. L. J. 182; *Reg. v. Tweedy*, 23 U. C. Q. B. 120; per *Draper*, C. J.; and see 32 & 33 Vic., c. 29, ss. 23, 32 and 78.

(i) See *Reg. v. Magrath*, 26 U. C. Q. B. 385.

(j) *Ex parte Estabrooks*, 4 Allen, 280, per *Wilmot*, J.

that a man is twice tried, a trial which proceeds to its legitimate and lawful conclusion by verdict is meant. When a man is said to be twice put in jeopardy, it signifies a putting in jeopardy by the verdict of a jury, and that he is not tried nor put in jeopardy until the verdict comes to pass; because if that were not so, it is clear that in every case of defective verdict a man could not be tried a second time, and yet it is admitted that, in the case of a verdict palpably defective, though the jury have pronounced upon the case, yet it will not avail the party if a second time put on trial. (*k*)

A party is not necessarily in jeopardy when a jury is sworn and evidence given. The true and rational doctrine is that, where a trial proves abortive by reason of no legal verdict having been given, the acquittal is no bar to a subsequent indictment, and a *venire de novo* may be awarded. (*l*)

A party is not in jeopardy, in the legal sense of the word, if there is a verdict against him on a bad indictment. (*m*) The rule means that a man shall not twice be put in peril after a verdict has been returned by the jury, that verdict having been given on a good indictment, and one on which the prisoner could be legally convicted and sentenced. (*n*)

Where a jurymen is taken ill, or some unforeseen accident occurs, which would be within the ordinary excepted cases in which a jury may properly be discharged, or the jury give an imperfect verdict, or one which cannot be supported in point of law, a *venire de novo* may be awarded, and the defendant cannot plead *autrefois acquit*, because he has not been in legal jeopardy. (*o*)

The pleas of *autrefois convict* and *autrefois acquit* are the

(*k*) *Reg. v. Charlesworth*, 9 U. C. L. J. 49, per Cockburn, C. J.; 1 B. & S. 460; 31 L. J. (M. C.) 25; see also *Reg. v. Sullivan*, 15 U. C. Q. B. 199.

(*l*) *Ibid.*; 50, per Wightman, J.

(*m*) *Ibid.*; 51, per Crompton, J.; *Reg. v. Green*, 3 U. C. L. J. 19; Deara & B. 113.

(*n*) *Winsor v. Reg.* L. R. 1 Q. B. 311, per Cockburn, C. J.; see also *Reg. v. Mayrath*, 26 U. C. Q. B. 385; *Reg. v. Murphy*, L. R. 2 P. C. App. 548, per Sir Wm. Erle.

(*o*) *Reg. v. Charlesworth*, 9 U. C. L. J. 50, per Wightman, J.

only pleas known to the law of England to stay a man from being tried on an indictment or information. (*p*)

If the prisoner might have been convicted upon the first indictment, though, in fact, he was acquitted by a mistaken direction of the judge, he may plead *autrefois acquit*.

If a man commits a burglary, and at the same time steals goods out of the house, if he be indicted for the larceny only and be acquitted, yet he may be indicted for the burglary afterwards, and *e converso*, if indicted for the burglary with intent to commit larceny, and he be acquitted, yet he may be indicted for the larceny, for they are several offences, though committed at the same time. A man, acquitted of stealing the horse, may be convicted of stealing the saddle, though both were done at the same time. (*q*)

It would seem that in all cases where, by our statute law, a prisoner indicted for one offence is liable to be convicted of another, an acquittal or conviction of the former would be a good bar to an indictment for the latter. (*r*) In fact, s. 52 of the 32 & 33 Vic., c. 29, provides that no person shall be tried or prosecuted for an attempt to commit any felony or misdemeanor who has been previously tried for committing the same offence.

A conviction for assault, the charge being of assault, by justices in Petty Sessions, at the instance of the person assaulted, and imprisonment consequent thereon, are not, either at common law or under the 32 & 33 Vic., c. 20, s. 45, a bar to an indictment for manslaughter of the person assaulted, should he subsequently die from the effects of the assault. (*s*) The word "cause" in the section, must be read as synonymous with "accusation" or "charge," and in this case, the accusation or charge was the assault; consequently, a conviction therefor was only a bar to a subsequent indictment for the same offence.

(*p*) *Winsor v. Reg.* L. R. 1 Q. B. 314, per *Blackburn, J.*; *Reg. v. Charlesworth*, *supra*, 49. per *Cockburn, C. J.*

(*q*) *Reg. v. Magrath*, 26 U. C. Q. B. 388 *et seq.* per *Draper, C. J.*

(*r*) See 32 & 33 Vic., c. 21, s. 74-99; c. 29, ss. 49, 50 and 51; and *Reg. v. Gorbett*, *Dears. & B.* 166; 26 L. J. (M. C.) 47.

(*s*) *Reg. v. Morris*, L. R. 1 C. C. R. 90.

A conviction for assault in breach of recognizance is no bar to proceedings by *sci. fa.* on the recognizance. (t)

But if a party be charged before a justice of the peace with an assault, and he dismiss the complaint, giving a certificate under this clause, the defendant can avail himself of the certificate as a defence to an action for tearing the plaintiff's clothes, on the same occasion. (u)

If a plea *autrefois acquit* or *convict* be overruled, the prisoner may plead not guilty, and be tried at the same Court of Oyer and Terminer. (v)

A plea of *autrefois convict* is not proved by the production of the record, and verdict endorsed. (w)

A plea describing a statute, as passed in the 4th and 5th years of the reign of Queen Victoria, is bad on demurrer. (x) It seems a demurrer must be to the entire count or plea, and not to part of it; and if it is good upon the whole, anything else which it contains, which by itself would be insufficient, is mere surplusage. (y)

After a demurrer is overruled, to allow a party to plead not guilty is substantially correct, if regarded in what perhaps is the proper view to take of it, as an amendment allowed to the party before final judgment. (z)

The first count of an indictment on the Con. Stats. Can., c. 6, s. 20, charged that the defendant, after having made the alphabetical list of persons entitled to vote, etc., made out a duplicate original of the said list, and certified by affirmation to its correctness, and delivered the same to the clerk of the peace, and that in making out the certified list, so delivered to the clerk of the peace, of persons entitled to vote, etc., the defendant did feloniously omit, from said list,

(t) *Reg. v. Harmer*, 17 U. C. Q. B. 555.

(u) *Julien v. King*, 17 L. C. R. 268.

(v) See *Reg. v. Magrath*, 26 U. C. Q. B. 385.

(w) *Re Warner*, 1 U. C. L. J. N. S. 18, per *Hagarty*, J.

(x) *Johnstone v. Odell*, 1 U. C. C. P. 406, per *McLean*, J.; *Hurok B. G. v. London D. C.*, 4 U. C. Q. B. 303.

(y) *Mulrahy v. Reg.*, L. R. 3 E. & L. App. 329, per Lord *Cranworth*.

(z) *Ibid.* 323, per *Willes*, J.

the names, etc., which names, or any or either of them, ought not to have been omitted. The second count was nearly the same as the first, the word "insert" being used where the word "omit" was used in the first. Upon demurrer to the indictment, the court held that the omission charged, having been from the certified list delivered to the clerk of the peace or "duplicate original," the words "said list," referring to the words "the certified list so delivered to the clerk of the peace," was a sufficient description to indentify the list intended.

As to the objection that it did not appear that the persons whose names were charged to have been omitted, etc., were persons entitled to vote, etc., it was held that the words in the indictment were not a direct and specific allegation that those persons were entitled to vote. As to an objection that it was not alleged that the list was made up from the last revised assessment roll, the court held that by the indictment it appeared that the assessment roll referred to was the assessment roll for 1863, and that it was sufficiently stated that the alphabetical list was made up for that year, and that the Crown would be bound to prove such a list; and further, that both counts of the indictment were bad, as they should have shown explicitly how and in what respect these names should or should not have been on the list, by setting out that they were upon, or were not upon, the assessment roll as the case might be, or at any rate were, or were not, upon the alphabetical list. (a)

Matter of description, in an indictment, though unnecessarily alleged, must be proved as laid. Therefore, where, in an indictment for assaulting a gamekeeper of the Duke of Cambridge, under 9 Geo. IV., c. 69, s. 2, the Duke was described as "George William Frederick Charles, Duke of Cambridge," and it was proved that "George William" were two of his names, but that he had other names which were not proved, and it was found by the verdict that the jury were satisfied

(a) *Reg. v. Switzer*, 14 U. C. C. P. 470.

of the identity of the Duke, and the prisoners were convicted, it was held that the conviction was wrong; that under 14 & 15 Vic., c. 100, s. 24, an amendment might have been made at the trial, by which the conviction would have been supported by striking out all the Christian names; but it was now too late, and that the Court of Quarter Sessions were not bound to amend; and that an amendment, by striking out the two names only which were not proved, would have been wrong. (b)

An indictment could not be amended at common law without the consent of the grand jury, on whose oath it was found. (c)

The 32 & 33 Vic., c. 29, s. 70 *et seq.*, contains provisions as to the amendment of indictments in certain cases.

Any objections for any defect apparent on the face of an indictment must be taken before plea. (d) And the "merits of the case," with reference to amendments in section 71, means the justice of the case as regards the guilt or innocence of the prisoner, and "his defence on such merits" means a substantial and not a formal and technical one. (e)

It would seem that a defect in laying the property in an indictment might be amended under s. 71. (f) And under a section of an English Act somewhat analogous to sec. 71, it was held that the judge had power to amend an indictment for perjury, describing the justices before whom the perjury was committed, as justices for a county, where they were proved to be justices for a borough only. (g)

The word "money" was substituted for "nineteen shillings and sixpence," in an indictment on the application of the Crown; (h) and in an indictment for arson, the words "with

(b) *Reg. v. Frost*, 1 U. C. L. J. 135; Dears. 474; 24 L. J. (M. C.) 116.

(c) *Re Conklin*, 31 U. C. Q. B. 167, per *Wilson*, J.

(d) *Reg. v. Flynn*, 2 Pugsley & B. 321.

(e) *Reg. v. Cronin*, Rob. & Jos. Dig. 904.

(f) *Reg. v. Jackson*, 19 U. C. C. P. 280; *Reg. v. Quinn*, 29 U. C. Q. B. 164, per *Richards*, C. J.

(g) *Reg. v. Western*, L. R. 1 C. C. R. 122; 37 L. J. (M. C.) 81.

(h) *Reg. v. Gamble*, L. R. 2 C. C. R. 1.

intent to defraud" were struck out, the evidence on the part of the Crown having failed to show a special intent; (i) and where one of the prosecutor's Christian names is omitted, it may be inserted. (ii)

The motion to quash must be before the evidence is gone into; (j) and the court will not allow the defendant's plea to be withdrawn for the purpose of admitting a demurrer without also allowing the Crown to amend. (k)

Where an amendment has once been made, the case must be decided upon the indictment in its amended form. (l)

The amendment must in all cases be made before verdict. (m) But leave to amend may be granted under the same sections, at any time from the finding of the indictment (n) till after counsel have addressed the jury. (o)

Upon an amendment of the indictment at the trial, no postponement of the trial will be granted, if the prisoner is not prejudiced in his defence. (p) And an application to postpone a trial in consequence of the absence of witnesses, must be supported by special affidavit showing that the witnesses in question are material. (q)

Section 72 of the 32 & 33 Vic., c. 29, enacts that after any such amendment the trial shall proceed, whenever the same is proceeded with, in the same manner and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury, and in all other respects as if no such variance had occurred.

A count on an indictment charging a prisoner, under the 32 & 33 Vic., c. 20, s. 52, with unlawfully and carnally knowing

(i) *Reg. v. Cronin*, Rob. & Jos. Dig. 904.

(ii) *Cornwall v. Reg.*, 33 U. C. Q. B. 106.

(j) *Reg. v. Bourdon*, 2 *Revue Leg.* 713.

(k) *Reg. v. McLean*, 1 Pugsley & B. 377.

(l) *Reg. v. Barnes*, L. R. 1 C. C. R. 45; 35 L. J. (M. C.) 204.

(m) *Reg. v. Frost*, Dears. 474; 27 L. J. (M. C.) 116; *Reg. v. Larkin*, Dears. 365; 23 L. J. (M. C.) 125.

(n) *Reg. v. Morrison*, 2 Pugsley & B. 682.

(o) *Reg. v. Fullarton*, 6 Cox, 194; Arch. Cr. Pldg. 207; but see *Reg. v. Rymes*, 3 C. & K. 326.

(p) *Reg. v. Senecal*, 8 L. C. J. 287.

(q) *Reg. v. Douyall*, 18 L. C. J. 85.

and abusing a girl, and also with an assault at common law, might be objectionable on the ground of duplicity. (r)

Counts for different misdemeanors of the same class may be joined in one indictment. (s)

Where different felonies are charged in different counts of an indictment, and an objection is taken to the indictment on that ground, before the prisoner has pleaded or the jury are charged, the judge, in his discretion, may quash the indictment; or, if it be not discovered until after the jury are charged, the judge may put the prosecutor to his election on which charge he will proceed. (t)

But in one case where the prisoner was convicted on an indictment containing two counts charging separate offences, and sentenced, and the evidence did not sustain the charge on one of the counts, the judgment was arrested. (u)

Counts under the 39 Geo. III., c. 85, for embezzling bank notes, might have been joined with counts for larceny at common law, (v) and the prosecutor would not, at the opening of his case, have been put to his election as to whether he would proceed on the statutory or common law count, though he would have been limited to one state of facts relating to one single act of offence. (w)

But counts ought not to be joined in an indictment against a prisoner for stealing and also for receiving, and the reason is, because they are, in fact, totally distinct offences, and the prisoner cannot be found guilty of both. But when the two facts charged form part of one and the same transaction, and are not repugnant, they may be properly joined, as in indictments for forgery, where one count is inserted for forgery and another for uttering the forged instrument. (x)

(r) *Reg. v. Guthrie*, L. R. 1 C. C. R. 242, per *Bovill*, C. J.

(s) *Reg. v. Abrahams*, 24 L. C. J. 325.

(t) *Young v. Reg.*, 3 T. R. 106; *Reg. v. Heywood*, L. & C. 451; 33 L. J. (M. C.) 133; Arch. Cr. Pldg. 70.

(u) *Reg. v. Hathaway*, 6 Allen, 352.

(v) *Rex v. Johnson*, 3 M. & S. 539.

(w) *Reg. v. Cummings*, 4 U. C. L. J. 184, per *Draper*, C. J.

(x) *Rex v. Blackson*, 8 C. & P. 43, per *Parke*, B.; *Reg. v. Russell*, 3 K. & J. 254.

It would seem that, where there is only one offence charged, or *corpus delicti* complained of, the prosecutor cannot be put to his election, nor the indictment be quashed though it contain several counts, all alleging the commission of the offence in different ways; in other words, it is not objectionable to vary the statement in the indictment in order to meet the evidence. (y)

Where an indictment contained two counts—the first for embezzlement as servant, the second for larceny as bailee, the prosecution was allowed to elect. (z)

There is no objection to the joinder of counts for embezzlement and larceny as a servant, and on the latter count there may be a conviction for larceny as a bailee. (a)

So it is not a misjoinder of counts to add statements of a previous conviction for misdemeanor, as counts to a count for larceny, under the 32 & 33 Vic., c. 21, s. 18; and the objection, at all events, could only be raised by demurrer, or motion to quash the indictment, pursuant to the 32 & 33 Vic., c. 29, s. 32. (b)

If the statements of the previous convictions are not treated as counts, but merely as statements made for the purpose of founding an inquiry, to be entered into only in the event of the prisoner being found guilty of the offence charged in the indictment; yet if they were not inquired into at all, and the jury was not charged with them, so that the prisoner was not prejudiced by their insertion, and if, after a conviction on the count for larceny, a demurrer to these statements, as insufficient in law, is decided in favor of the prisoner, a court of error will not reopen the matter, on the suggestion that there is a misjoinder of counts. (c) Nor is duplicity a ground of error. (d)

(y) See *Reg. v. School*, 28 U. C. Q. B. 214; Arch. Cr. Pldg. 72.

(z) *Reg. v. Holman*, 9 U. C. L. J. 223; L. & C. 177; see also *Reg. v. Ferguson*, 1 U. C. L. J. 55; Dears. C. C. 427.

(a) 2 Russ. Cr. 247 n.

(b) *Reg. v. Mason*, 32 U. C. Q. B. 246; *Reg. v. Ferguson*, 1 Dears. 427.

(c) *Reg. v. Mason*, *supra*.

(d) *Cornwall v. Reg.*, 33 U. C. Q. B. 106.

If there be an exception or proviso in the enacting clause of a statute, it must be expressly negatived in the indictment. (e)

The rule is, that, when the enacting clause of a statute constitutes an act to be an offence under certain circumstances and not under others, then, as the act is an offence only *sub modo*, the particular exceptions must be expressly specified and negatived; but when a statute constitutes an act to be an offence generally, and in a subsequent clause makes a proviso or exception in favor of particular cases, or in the same clause, but not in the enacting part of it, by words of reference or otherwise, then the proviso is matter of defence or excuse, which need not be noticed in an indictment. (f)

The reason why the exceptions in the enacting clause should be negatived is because the party cannot plead to such an indictment, and can have no remedy against it, but from an exception to some defect appearing on the face of it. (g)

The statement of the time when an offence is committed was never considered material, so long as there was proof of the offence occurring before the preferring of the indictment. (h)

The 32 & 33 Vic, c. 29, s. 23, would seem to render an averment of time unnecessary, in any case where time is not of the essence of the offence. (i)

It was formerly necessary that an indictment for homicide should describe the manner of the death, and the means by which it was effected. (j) But these need not now be stated. When, however, a statute makes the means of effecting an act material ingredients in the offence, it is necessary

(e) *Reg. v. White*, 21 U. C. C. P. 354.

(f) *Ibid.* 355, per Galt, J.

(g) *Ibid.* 356, per Galt, J.; and see Arch. Cr. Pldg. 62; *Spieres v. Parker*, 1 T. R. 141; *Reg. v. Earnshaw*, 15 Ea. 456; *Rex v. Hall*, 1 T. R. 320; *Steel v. Smith*, 1 B. & Ald. 94; Dwarria, 515-6.

(h) *Reg. v. Hamilton*, 16 U. C. C. P. 355, per Richards, C. J.

(i) See *Mulcahy v. Reg.*, L. R. 3 E. & I. App. 322, per Willes, J.

(j) See *Reg. v. Shea*, 3 Allen, 130-1, per Carter, C. J.

that the means should be set out in the indictment ; for an indictment must bring the fact of making an offence within all the material words of the statute, and all necessary ingredients in the offence must be alleged. (*k*)

Thus, where a statute provides that " whosoever shall maliciously, by any means manifesting a design to cause grievous bodily harm," etc., attempt to cause grievous bodily harm to any person, the means should be set out with such particularity as necessarily to manifest the design which constitutes the felony, or there should be an allegation following the words of the Act. (*l*)

So it would seem that in an indictment, on the 32 & 33 Vic., c. 20, s. 20, for attempting, " by any means calculated to choke," etc., to render any person insensible, with intent, etc., should set forth the means, for they are material as to the offence. But it would no doubt be sufficient to follow the forms in the schedule to the 32 & 33 Vic., c. 29, in any case to which they are applicable.

It is not necessary that the proof should, in all cases, tally with the mode of death laid in the indictment. Where an indictment charged the prisoner with feloniously striking the deceased on the head with a handspike, giving him thereby a mortal wound and fracture, of which he died : it was proved that the death was caused by the blow on the head with the handspike, but that there was no external wound or fracture, the immediate cause of death being concussion of the brain, produced by the blow ; and the court held that it is sufficient if the mode of death is substantially proved as laid, and it is not necessary that all the intermediate steps between the primary cause and the ultimate result should be also alleged and proved. (*m*)

The venue of legal proceedings is intended to show where the principal facts and circumstances in the proceedings

(*k*) See *Reg. v. Magee*, 12 Allen, 16, per Carter, C. J.; Arch. Cr. Pldg. 60-3.

(*l*) *Reg. v. Magee*, *supra*.

(*m*) *Reg. v. Shea*, 3 Allen, 129.

occurred, or were alleged to have occurred, with a view to showing that the court and jury have jurisdiction in the matter. It was formerly necessary to state in the indictment the venue expressly, or, by reference to the venue in the margin, to every material allegation. (n)

But now, by the 32 & 33 Vic., c. 29, s. 15, it is not necessary to state any venue in the body of any indictment. Section 11 of this statute relates to procedure only, and does not authorize any order for the change of the place of trial of a prisoner, in any case where such change would not have been granted under the former practice. The statute does away with the old practice of removing the case, by *certiorari*, into the Queen's Bench, and then moving to change the venue. (o)

Under sec. 9 of this statute, the offence may be alleged to have been committed in any district, county, or place through any part whereof the coach, waggon, cart, carriage, or vessel, boat or raft passed, in the course of the journey or voyage during which the offence was committed, and the indictment need not state the place where the offence was actually committed. (p)

Where an indictment stated an assault committed upon one Marsh, at Fredericton, in the county of York, but the assault was proved to have been committed on board a steamboat, on the river St. John, in the course of its passage from St. John to Fredericton, before the steamboat arrived within the county of York, and while it was passing through another county; it was held that the indictment was sufficient, and that it was unnecessary to allege the facts as they actually occurred. (q)

But where a prisoner was tried at Amherst upon an indictment containing two counts, one for robbery and the other for receiving stolen goods, and both offences were

(n) *Reg. v. Atkinson*, 17 U. C. C. P. 299-300, per *J. Wilson, J.*

(o) *Reg. v. McLeod*, 6 C. L. J. N. S. 64; 5 U. C. P. R. 181.

(p) See *Reg. v. Webster*, 1 Allen, 589.

(q) *Ibid.*

proved to have been committed at Truro, situated in a county different from Amherst; the jury having found a general verdict of guilty on both counts, it was held that the prisoner should have been proceeded against only on the count for receiving; and that although he might be guilty of both offences, yet, as the robbery was committed in another county than that in which the trial took place, the prisoner was discharged. (r)

So where a prisoner hired a horse in the county of York to go to Aurora in that county, and afterwards sold the horse in the county of Waterloo, it was considered that no offence was shown in the former county. (s)

But where the prisoner, at Seaforth, in the county of Huron, falsely represented to the agent of a sewing machine company, that he owned a lot of land, and thus induced the agent to sell machines to him, which were sent to Toronto, in the county of York, and delivered to him at Seaforth; it was held that the offence was complete at Huron. (t)

The venue in criminal proceedings, as in civil, may be changed in a proper case. But it has been held in Quebec, that the Court of Queen's Bench there, sitting in appeal, will not entertain such an application on behalf of a person charged with an offence in the District of Three Rivers, where no reason appears why the application should not have been made before the judge resident in that district, where the offence would otherwise be triable. (u)

It would seem that no objection to the caption of an indictment, for an allegation that the grand jurors were "sworn and affirmed," can be sustained without showing that those who were sworn were persons who ought to have affirmed, or that those who affirmed were persons who ought to have sworn. (v)

(r) *Reg. v. Russell*, 3 Russ. & Chesley, 254.

(s) *Re Robinson*, 7 U. C. P. R. 239.

(t) *Reg. v. Feithenheimer*, 26 U. C. C. P. 139.

(u) *Ex parte Corvin*, 24 L. C. J. 104.

(v) *Mulcahy v. Reg.*, L. R. 3 E. & I. App. 306.

It is no objection to the indictment that the previous conviction is laid at the commencement; though, when the prisoner is given in charge to the jury, the subsequent felony must be read alone to them, in the first instance. (w)

It is no error to add allegations of previous convictions of misdemeanor to a count for larceny; and at any rate, the question can be raised only by demurrer on motion to quash before plea. (x)

Where a prosecutor has been bound, by recognizance, to prosecute, and give evidence against a person charged with perjury in the evidence given by him on the trial of a certain suit, and the grand jury have found an indictment against the defendant, the court will not quash the indictment because there is a variance in the specific charge of perjury contained in the information and that contained in the indictment, provided the indictment sets forth the substantial charge contained in the information, so that the defendant has reasonable notice of what he has to answer. (y)

An application to quash an indictment should be made *in limine* by demurrer or motion, or the defendant should wait the close of the evidence for the prosecution to demand an acquittal. (z)

Applications to quash an indictment are considered applications to the discretion of the court. (a)

A defective indictment may be quashed on motion as well as on demurrer. (b)

It is unusual to quash an indictment on the application of a defendant, when it is for a serious offence, unless upon the clearest and plainest grounds; but the court will drive the party to a demurrer, or motion in arrest of judgment,

(w) *Reg. v. Hilton*, 5 U. C. L. J. 70; *Bell*, 20; 28 L. J. (M. C.) 28; and see *Reg. v. Mason*, 22 U. C. C. P. 248.

(x) *Reg. v. Mason*, *supra*.

(y) *Reg. v. Broad*, 14 U. C. C. P. 168.

(z) *Reg. v. Roy*, 11 L. C. J. 90, per *Drummond*, J.; see 32 & 33 Vic., c. 29, s. 32.

(a) *Reg. v. Belyea*, 1 James, 277, per *Dodd*, J.; *Rex v. Hunt*, 4 B. & Ad. 430.

(b) *Reg. v. Bathgate*, 13 L. C. J. 299.

or writ of error. It is, therefore, a general rule that no indictments which charge the higher offences, as treason or felony, will be thus summarily set aside. (c)

The omission of the residences and occupations of grand jurors, in the list and in the panel, was held sufficient ground for quashing an indictment for felony. (d)

Where an indictment charges no offence against law, the objection may be properly taken in arrest of judgment, or the indictment may be demurred to, or a writ of error will lie. (e) But the omission of the word "feloniously" is aided by verdict. (f)

No mere formal defect, in an indictment, can be objected to after the prisoner is found guilty and sentenced at the Court of Oyer and Terminer. (g)

An objection to an indictment, as insufficient in law, made after the swearing of the jury, and after the prisoner was given in charge of them, was held not too late; for otherwise there never could be a motion in arrest of judgment. (h) Also, that an objection may be made at any time for a substantial but not for a formal defect, and that the 32 & 33 Vic., c. 29, s. 32, only applies to the latter. (i)

The forms of indictment in the 32 & 33 Vic., c. 29, schedule A, are intended as guides to simplify forms of indictments. They cannot be made use of in cases to which they are not applicable, so as to misinform a person of the nature of the offence with which he stands charged. (j) The adoption of the forms is discretionary. (k)

It is sufficient if an indictment be signed by the clerk of

(c) *Reg. v. Belyea*, *supra*, 225, per *Dodd*, J.

(d) *Ibid.* 220.

(e) *Reg. v. Clement*, 26 U. C. Q. B. 300, per *Draper*, C. J.

(f) *Reg. v. Quinn*, 1 Russ. & Geldert, 139.

(g) *Horseman v. Reg.*, 16 U. C. Q. B. 544, per *Robinson*, C. J.

(h) *Reg. v. Ryland*, L. R. 1 C. C. R. 99; 37 L. J. (M. C.) 10.

(i) *Ibid.*

(j) *Reg. v. Cummings*, 4 U. C. L. J. 188-9, per *Spragge*, V.-C.

(k) *Ibid.*; and see *Reg. v. McLaughlin*, 3 Allen, 159.

the Crown, (l) or by the counsel prosecuting for the provincial Attorney General. (m)

Before pleading to an indictment, the defendant must submit to the jurisdiction of the court. (n)

The prisoner must plead in abatement before he pleads in bar. (o)

No more than one plea can be pleaded to any indictment for misdemeanor or criminal information. (p)

A prisoner will be allowed to withdraw his plea of "guilty" if it appear that he may have been under some misapprehension when he pleaded, and might thereby suffer injury. (q)

(l) *Reg. v. Grant*, 2 L. C. L. J. 276.

(m) *Reg. v. Downey*, 13 L. C. J. 193.

(n) *Reg. v. Maxwell*, 10 L. C. R. 45.

(o) *Whelan v. Reg.*, 28 U. C. Q. B. 47.

(p) *Reg. v. Charlesworth*, 1 B. & S. 480; 31 L. J. (M. C.) 26.

(q) *Reg. v. Huddell*, 20 L. C. J. 301.

CHAPTER X.

PRACTICE.

There are three principal modes provided by the law of England for the prosecution of criminals: by indictment preferred by a grand jury; by criminal information to a superior court; and by summary proceedings before justices of the peace, by virtue of special powers conferred on them to that end by various statutes.

As proceedings by indictment usually, though not necessarily, follow the commitment of prisoners by justices of the peace, and as criminal informations are comparatively rare in this country, we will consider first the nature of that body, both with regard to their duties in holding preliminary investigations, and also with regard to their powers of summary conviction; then proceedings on indictments and criminal informations will be treated of; after which, various questions of practice, relating to the trial and the steps subsequent thereto, will be discussed.

Justices of the peace were first appointed in the reign of Edward I., (a) but with powers much less extended than have since been conferred on them.

By 29 Vic., c. 12, the oath of qualification of a justice may be taken either before some other justice of the peace, or before any person assigned by the governor to administer oaths and declarations, or before the clerk of the peace of the district or county for which the justice intends to act; and all such oaths theretofore taken before the last mentioned officer, or before a commissioner assigned by *Dedimus potestatem* to administer oaths, or before a person

(a) *Reg. v. Atkinson*, 17 U. C. C. P. 300, per *J. Wilson, J.*

acting as, but not being, a duly qualified justice of the peace for the same county, are confirmed. (b)

The fact of a justice acting as such is *prima facie* evidence of his appointment to the office; (c) and the mere production of a certificate, purporting to be under the hand and seal of the clerk of the peace, that there is no declaration of the justice's qualification filed in his office as required by the above statute, is not sufficient to rebut the presumption. (d)

Under the commission of the peace, justices have a general power for conservation of the peace, and the apprehension of all persons charged with indictable offences, and, on examination, to discharge, admit to bail, or commit for trial; (e) and their duties with regard to the same are prescribed by the 32 & 33 Vic., c. 30.

A justice's jurisdiction is confined to the county for which he has been appointed, (f) and of course he has no power to administer an oath or take any examination within the limits of a foreign country. (g) And where the justice has no jurisdiction, the consent of the prisoner cannot confer it. (h)

There should properly be an information laid; (i) but this is not essential to confer jurisdiction to hold a preliminary investigation; for so long as the prisoner is before the magistrate, the manner of his getting there is of little moment. (j)

Though a justice of the peace have jurisdiction over an offence in other respects, still, special circumstances, as, for

(b) Sec. 2; and see *Herbert q. t. v. Downwell*, 24 U. C. Q. B. 427.

(c) *Berryman v. Wise*, 4 T. R. 366.

(d) *Reg. v. White*, 21 U. C. C. P. 354.

(e) *Connors v. Darling*, 23 U. C. Q. B. 543, per Gowan, J.

(f) *Reg. v. Wheton*, 3 All-n., 289.

(g) *Nary v. Owen*, Ber. 377.

(h) *Reg. v. Hebert*, 5 *Revue Leg.* 424.

(i) *Caudle v. Ferguson*, 1 Q. B. 889; *Friel v. Ferguson*, 15 U. C. C. P. 594, per A. Wilson, J.

(j) *Reg. v. Mason*, 29 U.C.Q.B. 431; *Reg. v. Hughes*, L. R. 4 Q. B. D. 614.

instance, where he is interested in the prosecution, (*k*) will render him incompetent to act ; and any steps he may take in violation of this rule will be set aside. (*l*)

But as a general rule, the justice should decide any question involving an exception to his jurisdiction, or an exemption from any other cause, in order that the superior court may judge of the sufficiency of the same. (*m*)

Under R. S. O., c. 72, s. 4, a police magistrate for a city is *ex officio* a justice of the peace for the county in which such city lies. Under this section an alderman is not *ex officio* legally authorized to act as a justice of the peace until he has taken the oath of qualification as such. (*n*)

The plain import of the statute is to establish certain local courts, having limited criminal jurisdiction, and to define the respective jurisdictions of the police magistrate of a city situate within a county, and of the justices of the peace of that county, in respect of offences committed within the city and county respectively. (*o*)

By the 38 Vic., c. 47, any person charged with any offence in Ontario for which he might be tried at the General Sessions, may, with his consent, be tried by a police or stipendiary magistrate, and if found guilty, sentenced in the same manner as he might have been before the sessions.

Where a statute confers summary jurisdiction on two justices, or any stipendiary or police magistrate, a conviction by the latter must show that he is such a magistrate. (*p*) And it may be doubted whether, under such circumstances, one justice could sit for such a magistrate, or whether two would not be necessary. (*q*) And clearly, if not sitting for a magistrate, a conviction by one would be bad. (*r*)

(*k*) *Reg. v. Simmons*, 1 Pugsley, 158 ; *Reg. v. Milledge*, L. R. 4 Q. B. D. 332 ; *Reg. v. Meyer*, L. R. 1 Q. B. D. 173 ; *Reg. v. Gibbon*, L. R. 6 Q. B. D. 169 ; *Re Holman*, 3 Russell & Chealey, 375.

(*l*) *Reg. v. Simmons*, *supra*.

(*m*) *Re Dubord*, 14 L. C. J. 203.

(*n*) *Reg. v. Boyle*, 4 U. C. P. R. 256.

(*o*) *Reg. v. Morton*, 19 U. C. C. P. 27, per Gwynne, J.

(*p*) *Reg. v. Clancey*, 7 U. C. P. R. ; and see 32 & 33 Vic., c. 28.

(*q*) *Ibid.* ; see 36 Vic., c. 48, s. 305 ; and see *Re Crow*, 1 U. C. L. J. N. S. 302 ; 1 L. C. J. 189.

(*r*) *Re Crow*, *supra*.

Where a statute directs justices of a division, or near a certain place, to do a certain act, any justice of the county may do it. (s)

It is no objection under R. S. O., c. 3, that a conviction by justices for an offence tried in the county is signed by one of the justices, in a city having a police magistrate. (t)

Where a statute gives justices power to make by-laws and impose penalties, they cannot, without express authority from the legislature, levy such penalties by distress. (u)

Proceedings under the Rev. Stat., c. 146, s. 3 (N. B.), for knowingly solemnizing a marriage where either party is under twenty-one, without the consent of the father, are properly taken before two justices. The proceedings in such a case need not be in the name of the Queen. (v)

It has been held in New Brunswick, that where a summons has been issued by two justices, the cause must be tried before the same two justices, unless there be some special reason for not doing so, (w) which must appear on the face of the conviction, or at least it must show that the absent justices consented to it. (x) But one justice may issue the summons on a complaint, (y) and grant an adjournment, (z) though the penalty is recoverable before two justices.

Where two justices have heard a case, they must concur in their judgment; (a) but in a case before three, judgment may be rendered by two. (b) And the fact that one justice issued the summons in a matter over which he, sitting alone, might have jurisdiction, does not render him sole judge of the case; but if he allow other justices to sit with him, they

(s) *Reg. v. Wheton*, 3 Allen, 269.

(t) *Langwith v. Dawson*, 30 U. C. C. P. 375.

(u) *Kirkpatrick v. Asken*, Rob. & Jos. Dig. 1992.

(v) *Reg. v. Gallant*, 5 Allen, 115.

(w) *Weeks v. Borcham*, 2 Russell & Chesley, 377.

(x) *Dubord v. Boivin*, 14 L. C. J. 203.

(y) *Reg. v. Simmons*, 1 Pugsley, 158.

(z) *Ex parte Holder*, 6 Allen, 338.

(a) *St. Gemmes v. Cherrier*, 9 L. C. J. 22.

(b) *Ex parte Lumley*, 9 L. C. J. 169; *ex parte Trowley*, 9 L. C. J. 169; *ex parte Brodeur*, 2 L. C. J. 97.

have an equal voice with him in determining the question before them. (c)

On the examination of any person before a justice, on a charge of an indictable offence, with a view to his commitment for trial, no person has any right to be present without the permission of the presiding justice. (d) But it is different where the justices are sitting to try the offender under the Summary Conviction Act. (e)

Where the magistrate or justices are not simply holding a preliminary investigation, but proceed to adjudicate finally under the 32 & 33 Vic., c. 31, it seems necessary, in order to confer jurisdiction on them, that an information should be properly laid, (f) for by the express words of the statute, (g) their power of final adjudication is limited to "cases where an information is laid before one or more of Her Majesty's justices of the peace," etc. The power of justices to convict summarily results only from legislative sanction, and in all cases such authority must be shown, (h) and the maxim, *omnia presumuntur rite esse actu*, has no application to the acts of inferior courts. Therefore, on a prosecution for a penalty under a by-law of a corporation, the by-law must be proved, that the jurisdiction of the justices may appear on the proceedings. (i) And a conviction by summary process for an aggravated assault, committed on a voting day at an election for the House of Commons of Canada, was in Quebec held to be void, as the statute which constitutes the offence renders it punishable by indictment; and the offence is not included in those mentioned in the 32 & 33 Vic., c. 32, ss. 2 and 3. (j)

(c) *Reg. v. Milne*, 25 U. C. C. P. 94.

(d) 32 & 33 Vic., c. 30, s. 35.

(e) 32 & 33 Vic., c. 31, ss. 29 and 30.

(f) *Caudle v. Ferguson*, 1 Q. B. 889.

(g) *Friel v. Ferguson*, 15 U.C.C.P. 594; *Appleton v. Lepper*, 20 U.C.C.P. 142, per *Hagarty*, J.; *Powell v. Williamson*, 1 U. C. Q. B. 154; *Ex parte Eagles*, 2 Hannay, 53-4, per *Ritchie*, C. J.; *Connors v. Darling*, 23 U. C. Q. B. 546.

(h) *Bross v. Huber*, 18 U. C. Q. B. 286, per *Robinson*, C. J.; *Reg. v. O'Leary*, 3 Pugsley, 264.

(i) *Reg. v. Wortman*, 4 Allen, 73; *Rex v. All Saints, Southampton*, 7 B. & C. 785.

(j) *Reg. ex rel. Larouche v. Lenneux*, 5 Q. L. R. 261; ss. 2 and 3.

But the objection to the want of an information must be taken before the investigation is proceeded upon ; for if the party appears and defends the suit without an information being laid or the issue of a summons, the objection cannot afterwards avail him. (*k*) And the rule is applicable in the case of a defective information or summons. (*l*)

Unless a statute require that the information should be in writing, or on oath, it need not be so. (*m*)

An information stating that a woman did "unlawfully take and carry away from his (the informant's) protection her daughter, S. W.," does not give a justice authority to issue a warrant. (*n*)

Neither does a complaint charging a "clandestine removal of property;" the utmost that it does justify is the issuing of a summons under the Act relating to petty trespasses. (*o*)

An information charging that the defendant did on, etc., "obtain by false pretences from complainant the sum of five dollars, contrary to law," omitting the words "with intent to defraud," might by intendment be held to charge the statutory offence. (*p*)

If a statute gives summary proceedings for various offences, specified in several sections, an information is bad which leaves it uncertain under which section it took place. (*q*)

In summary proceedings for assault it is not necessary that the fact that the complainant requested the case to be tried summarily should appear on the proceedings, if the form given by the statute be followed. (*r*) And even when

(*k*) *Ex parte Wood*, 1 Allen, 422 ; *Reg. v. McMillan*, 2 Pugsley, 110 ; *Reg. v. O'Leary*, 3 Pugsley, 264.

(*l*) *Ex parte Coll*, 3 Allen, 48 ; *Crawford v. Beattie*, 39 U. C. Q. B. 13 ; *Stoness v. Lake*, 40 U. C. Q. B. 320.

(*m*) *Friel v. Ferguson*, 15 U. C. C. P. 594 ; *Re Conklin*, 31 U. C. Q. B. 168, per A. Wilson, J. ; see s. 24, 32 & 33 Vic., c. 31.

(*n*) *Stiles v. Brewster*, Stev. Dig. 811.

(*o*) *McNeillis v. Gartshore*, 2 U. C. C. P. 471, per McLean, J.

(*p*) *Crawford v. Beattie*, 39 U. C. Q. B. 13.

(*q*) *Thompson and Durnford*, 12 L. C. J. 287, per Mackay, J.

(*r*) *Reg. v. Shaw*, 23 U. C. Q. B. 616.

not, after conviction it will be intended that such request was made. (s)

In a complaint for breach of a by-law, it is not necessary to insert the by-law itself, or to make a distinct allegation that it is in force.

A complaint may be made and a summons issued for two offences, provided the defendant has not been arrested in the first instance, and a conviction for one of such offences specifying it is valid. Service of a copy of a summons, issued by a magistrate, followed by appearance of the defendant, is sufficient. (t)

Where two or more persons may commit an offence under an Act, the information may be jointly laid against them. (u) But where the penalty is imposed upon each person, it is wrong to convict them jointly, even when they are charged on a joint information. (v)

If either the penalty be imposed by the Act on each person convicted (even where the offence would, in its own nature, be single), or if the quality of the offence be such that the guilt of one person may be distinct from that of the other, in either of these cases the penalties are several. (w)

At Petty Sessions, an information was laid against two defendants, charging that they did unlawfully use a gun and kill two pheasants, contrary to the 1 & 2 Wm. IV., c. 32, s. 3. Each claimed to be tried separately, in order to call the other as a witness. The justices refused, and heard the charge against both together, and convicted them, and a conviction was drawn up separately against each defendant imposing a penalty of £3; and it was held that it was in the discretion of the justices whether they would hear the charge separately or not; that as the penalty was imposed on every person acting in contravention of the statute each defendant was separately liable to the whole penalty;

(s) *Reg. v. O'Leary*, 3 Pugsley, 264.

(t) *Corignan v. Harbor Comrs. Montreal*, 5 L. C. R. 479.

(u) *Reg. v. Littlechild*, L. R. 6 Q. B. 295, per Lush, J.

(v) *Ibid.* 295, per Mellor, J.

(w) *Ibid.* 296, per Hannen, J.

and that separate convictions were right, although the prisoners were charged on a joint information. (x)

Where a limited authority is given to justices of the peace, they cannot extend their jurisdiction to cases not within it, by finding as a fact that which is not a fact. (y) So neither does a discretion, whether they will do a particular thing, enable them, having heard the case, to refuse a warrant, because they think the law under which they are called upon to act is unjust. (z)

Where the charge laid, as stated in the information, does not amount in law to the offence over which the justice has jurisdiction, his finding the party guilty by his conviction, in the very words of the statute will not give him jurisdiction. The conviction would be bad on its face, all the proceedings being before the court. (a)

In a prosecution before justices, their jurisdiction is ousted by the accused setting up a claim of right; (b) yet that claim must be *bona fide*, and the mere belief of the accused, unsupported by any ground for the claim, (c) or a claim of right, which cannot by law exist, is insufficient. (d) And in such case they cannot inquire into or determine summarily any excess of force alleged to have been used in the assertion of title, (e) or the validity of the claim set up. (f) Proceedings by indictment are then the proper course. (g)

A complaint for assault under s. 43 of the 32 & 33 Vic., c. 20, cannot be withdrawn by the complainant, even with the consent of the justice; (h) for the charge has become a

(x) *Reg. v. Littlechild*, *supra*.

(y) *The Haidee*, 10 L. C. R. 101; *The Scotia* S. V. A. R. 160.

(z) *Reg. v. Boteler*, 4 B. & S. 959; 33 L. J. (M. C.) 101.

(a) *Re McKinnon*, 2 U. C. L. J. N. S. 327, per A. Wilson, J.

(b) *Reg. v. O'Brien*, 5 Q. L. R. 161.

(c) *Reg. v. Cridland*, 7 E. & B. 853; 27 L. J. (M. C.) 28; *Reg. v. Simpson*, 4 B. & S. 307; 32 L. J. (M. C.) 208.

(d) *Hudson v. McKae*, 4 B. & S. 585; 33 L. J. (M. C.) 65; *Hargreaves v. Deddanes*, L. R. 10 Q. B. 582.

(e) *Reg. v. Pearson*, L. R. 5 Q. B. 237.

(f) *Reg. v. Davidson*, 45 U. C. Q. B. 91.

(g) *Reg. v. Pearson*, L. R. 5 Q. B. 239, per Lush, J.

(h) *Re Conklin*, 31 U. C. Q. B. 160.

public matter, and the person charged has the right to have it tried; and further, because the complainant has made his election to have the case so disposed of, from which he cannot withdraw. (i)

If justices hear the case but decline to conclude it, as they should have done, they will be ordered to hear it; (j) so if they refuse to hear the whole case, and dismiss the summons. (k) But if justices, in their own discretion, refuse to hear a complaint which is the subject of an indictment, the court will not compel them to go on. (l)

The fact that the defendant pleads guilty to the charge cannot deprive the justice of the discretion he has to adjudicate on the case, under s. 46 of the last named statute.

The adjudication under that statute means the justice's final judgment or sentence to be pronounced. (m) If the justice adjudicate, the defendant will be entitled to the certificate, under s. 44, and if he do not adjudicate, there will be no certificate, and so there will be no bar to any subsequent proceedings. (n) There is no right to a certificate unless there has been a hearing upon the merits. (o)

A certificate under s. 44, given by a justice on a charge of assault and battery, is a defence to an indictment, founded on the same facts, charging an assault and battery, accompanied by malicious cutting and wounding, so as to cause grievous or actual bodily harm. (p) So, a former conviction by a justice is a bar to an indictment for felonious stabbing. (q) The certificate is also a bar to an indictment for assault, with intent to commit rape. (r)

(i) *Re Conklin*, 31 U. C. Q. B. 168, per *Wilson*, J.; see also *Tunncliffe v. Tedd*, 5 C. B. 553; *Vaughton and Bradshaw*, 9 C. B. N. S. 103.

(j) *Rex v. Tod*, Str. 531; but see *Reg. v. Shortiss*, 1 Russell & Geldert, 70.

(k) *Rex v. Justices of Cumberland*, 4 A. & E. 695.

(l) *Reg. v. Higham*, 14 Q. B. 396; *Re Conklin*, *supra*, 167, per *Wilson*, J.

(m) *Re Conklin*, 31 U. C. Q. B. 166, per *Wilson*, J.

(n) *Ibid.* 166, per *Wilson*, J.; *Hartley v. Hindmarsh*, L. R. 1 C. P. 553.

(o) *Re Conklin*, 31 U. C. Q. B. 168, per *Wilson*, J.

(p) *Ibid.* 165, per *Wilson*, J.; *Reg. v. Ebbington*, 1 B. & S. 688.

(q) *Reg. v. Walker*, 2 M. & Rob. 446; *Re Conklin*, *supra*, 165, per *Wilson*, J.

(r) *Ibid.*; *Re Thompson*, 6 H. & N. 193; 6 Jur. N. S. 1247.

An information or complaint may be amended, but if on oath, it must be re-sworn. (s)

One C. appeared to an information charging him with an assault, and praying that the case might be disposed of summarily, under the statute. The complainant applied to amend the information by adding the words "falsely imprison." This being refused, the complainant offered no evidence, and a second information was at once laid, including the charge of false imprisonment. The magistrate refused to give a certificate of dismissal of the first charge or to proceed further thereon, but endorsed on the information "Case withdrawn by permission of court, with a view of having a new information laid." It was held that the information might be amended, but that, as the original was under oath, it must be re-sworn. Under the circumstances, the more correct course would seem to have been to go on with the original case, and, under sec. 46, to refrain from adjudicating. (t)

A defective information may be aided by evidence, (u) and under s. 5 of the 32 & 33 Vic., c. 31, a variance between the information, complaint, or summons, and the evidence adduced on the part of the informant or complainant, is not fatal if the defendant has not been deceived or misled thereby, or has no defence on the merits. (v)

The object of the legislature, in this provision, seems to have been to prevent the failure of justice in cases where, by the old law, very great technical precision was required, and that before a tribunal where great legal accuracy could hardly be expected. (w) It may be doubtful, under the terms of the section, whether the question of the party having been misled is not merely for the discretion of the justices, as to adjourning the hearing to a future day. (x)

(s) *Re Conklin, supra.*

(t) *Ibid.* 160.

(u) *Reg. v. Williams*, 37 U. C. Q. B. 540.

(v) See *ex parte Dunlop*, 3 Allen, 281; *ex parte Parks*, 3 Allen, 237; see also secs. 21 and 22.

(w) *Ex parte Dunlop*, 3 Allen, 283-4, per Carter, C. J.

(x) *Ibid.* 284, per Carter, C. J.

But it would seem that this section must be held to apply only to informations made by persons who have authority to make them, and not to give vitality to an information made by a person without any authority, and, in fact, to give the justice jurisdiction over the matter when otherwise he would not have it. (y)

An information, by a person who has no authority to make it, is the same as no information. (z)

An information, to be tried before two justices, is good though only signed by one. (a)

As soon as the information has been properly laid, the justice issues his summons or warrant thereon, and proceeds to a hearing of the case. The practice as to this is fully set out in the 32 & 33 Vic., c. 30 and 31; the former applying to indictable offences, and providing for the issue of a warrant in the first instance; the latter to summary convictions, and requiring, before the issue of a warrant of arrest, the service of a summons requiring the attendance of the defendant.

The warrant of a justice is only *prima facie* evidence of its contents; and the recital that an information was laid prior to its issue may be rebutted. (b)

Although a warrant to a peace officer, by his name of office, usually gives him no authority out of the precincts of his jurisdiction, yet such authority may be expressly given on the face of the warrant. Therefore, where a warrant was directed to the constable of Thorold, in the Niagara District, authorizing him to search the plaintiff's house, in the township of Louth, in the same district; it not appearing that there was more than one person appointed to the office of constable of Thorold, it was held that the direction by description was good. (c)

(y) *Ex parte Eagles*, 2 Hannay, 54, per Ritchie, C. J.

(z) *Ibid.*

(a) *Falconbridge q. t. v. Tourangeau*, Rob. Dig. 260.

(b) *Friel v. Ferguson*, 15 U. C. C. P. 584; see also *Appleton v. Lepper*, 20 U. C. C. P. 138.

(c) *Jones v. Ross*, 3 U. C. Q. B. 328.

A warrant under 32 & 33 Vic., c. 31, is not bad though issued in form B. instead of form C. (*d*)

A warrant, though irregular, may be a justification to the officer who executes it, because he is not to canvass the legality of the process he executes, or set up his private opinion against that of the justice (*e*)

A warrant can be backed by a magistrate of a foreign county only "upon proof being made on oath or affirmation of the handwriting of the justice who issued the warrant," and an endorsement without such proof is illegal. (*f*)

Where an information contained every material averment necessary to give a magistrate jurisdiction to make an order for sureties to the peace, but contained also matter which it was contended so qualified the other averments as to render them nugatory, it was held that this was a judicial question for the magistrate to decide, and, therefore, that in issuing his warrant for the appearance of the accused he was not acting without jurisdiction, even though a superior court might quash his order to find sureties. (*g*)

The prisoner being before the justice, he must proceed in the manner pointed out by the statute above mentioned; witnesses must be examined whose evidence should be taken in writing; (*h*) for if no witnesses are examined, the commitment will be illegal.

The plaintiff was arrested upon a warrant issued by the defendant, a magistrate, and brought before him. Defendant examined the plaintiff, but took no evidence, said he could not bail, and committed the plaintiff to gaol on a warrant reciting that he was charged before him, on the oath of W. H., with stealing. The plaintiff did not ask to have any hearing or investigation, or produce, or offer to procure, any evidence on his behalf, or to give bail to the charge; but it

(*d*) *Reg. v. Perkins*, Stev. Dig. 810.

(*e*) *Ovens v. Taylor*, 19 U. C. C. P. 56, per *Hagarty*, C. J.; *Painter v. Liverpool Gas Co.*, 3 A. & E. 433.

(*f*) *Reid v. Maybee*, 31 U. C. C. P. 384.

(*g*) *Sprung v. Anderson*, 23 U. C. C. P. 152.

(*h*) *Reg. v. Flannigan*, 32 U. C. Q. B. 593.

was held that the commitment, without appearance of the prosecutor or examination of any witnesses, or of the plaintiff, according to the statute, or any legal confession, was an act wholly without, or in excess of, the jurisdiction of the magistrate, and illegal. (i)

Where a justice commences the examination of a party on a criminal charge, and after hearing a portion of the evidence refuses to proceed further, the prosecutor may, nevertheless, prefer an indictment against the prisoner before a grand jury. (j)

The justice may remand the prisoner from time to time for such period as may be reasonable, not exceeding eight clear days at any one time; and the remand must be in writing if for more than three clear days. (k)

The evidence taken, the justice, if not a case for summary conviction, should either discharge the prisoner or commit him for trial at the next court of competent criminal jurisdiction. But a discharge of a prisoner by one justice does not operate as a bar to the same person being again brought up before another justice, and committed upon the same charge, upon the same or different evidence. (l)

If the proceeding be by virtue of the summary powers of the justice, a conviction should be drawn up, and great care should be taken in its preparation.

The 32 & 33 Vic., c. 31, s. 50, enacts that "in all cases of conviction where no particular form of conviction is given by the Act or law creating the offence, or regulating the prosecution of the same, and in all cases of conviction upon Acts or laws hitherto passed, whether any particular form of conviction has been thereon given or not, the justice or justices who convict, may draw up his or their conviction, on parchment or on paper, in such one of the forms of conviction (I., 1, 2, 3,) as may be applicable to the case, or to

(i) *Connors v. Darling*, 23 U. C. Q. B. 541.

(j) *Reg. v. Duwaney*, 1 Hannay, 571.

(k) 32 & 33 Vic., c. 30, ss. 41 and 42.

(l) *Reg. v. Morton*, 19 U. C. C. P. 26, per *Gwynne*, J.

the like effect." So that it would be advisable hereafter to draw up all convictions in conformity with this Act. If the forms there given be not followed, the conviction to be good must either conform to those given in the particular statute under which proceedings are had, (*m*) or else be sufficient according to the general rules of law applicable in their construction. (*n*)

But the mere omission of immaterial words in a statutory form, such as "to be paid and applied according to law" in the clause imposing a fine, (*o*) or words added which do not materially alter the meaning of the form, such as inserting the name of the informer when not required, (*p*) will not render the conviction bad. (*q*)

Where the conviction does not follow any statutory form, it must be legal according to the principles of the common law; and in the first place should state that the party prosecuted had been summoned, and that he appeared, and that the evidence was taken in his presence. (*q*)

The name of the informant or complainant must also, in some form or other, appear on the face of the conviction. (*r*) The place for which the justice acts must be shown, and it must be alleged that the offence was committed within the limits of his jurisdiction, or facts must be stated which give jurisdiction beyond those limits. (*s*) But to state the township without alleging the county is sufficient, as the division of counties into townships is made by statute, of which the courts take judicial notice. (*t*)

The offence of which the defendant is convicted must be

(*m*) *Reg. v. Shaw*, 23 U. C. Q. B. 618; *Reid v. McWhinnie*, 27 U.C.Q.B. 289; *Reg. v. Hyde*, 16 Jur. 337; *Re Allison*, 10 Ex. 561; *ex parte Golding*, 1 Pugsley & B. 47.

(*n*) *Moore v. Jarron*, 9 U. C. Q. B. 233.

(*o*) *Rrg. v. Perkins*, Stev. Dig. 810.

(*p*) *Ex parte Eagles*, 2 Hannay, 53; *Reg. v. Johnson*, 8 Q. B. 102.

(*q*) *Moore v. Jarron*, 9 U. C. Q. B. 233.

(*r*) *R. Hennessey*, 8 U. C. L. J. 299.

(*s*) *Reg. v. Shaw*, 23 U.C.Q.B. 618, per *Draper*, C. J.; *Rex v. Edwards*, 1 Ea. 278.

(*t*) *Reg. v. Shaw*, 23 U. C. Q. B. 616.

stated with certainty, so as to be pleadable in the event of a second prosecution. (u) And a conviction "for wilfully damaging, spoiling, and taking, and carrying away six bushels of apples of the said Rogers, whereby the defendant committed an injury to the said goods and chattels" was held not to contain a statement of an offence for which a conviction could take place. (v)

And where an information in a conviction charged the defendant with measuring or surveying lumber intended for exportation, in violation of the Act of Assembly, 8 Vic., c. 81, and the evidence referred to three distinct acts, but it did not appear for which of them the defendant had been convicted, it was held that the conviction was bad for uncertainty. (w)

So where a conviction purporting to be made under Con. Stats. Can., c. 93, s. 28, charged that defendant, at a time and place named, wilfully and maliciously took and carried away the window sashes out of a building owned by one C., against the form of the statute, etc., without alleging damage, injury or spoil to any property, real or personal, or finding damage to any amount; it was held that the conviction should clearly show whether the damage, injury or spoil complained of, is done to real or personal property, stating what property; and in consequence of s. 29, where a private person is prosecutor, should also show the amount which the justice has ascertained to be reasonable compensation for such damage, injury or spoil. (x)

The offence created by the statute is damaging property, not taking and carrying it away. (y)

A conviction in the alternative is bad, as, for instance, adjudging the defendant to be imprisoned for twenty-five

(u) *Reg. v. Hoggard*, 30 U. C. Q. B. 152.

(v) *Eastman v. Reid*, 6 U. C. Q. B. 611.

(w) *Reg. v. Stevens*, 3 Kerr, 356.

(x) *Reg. v. Caswell*, 20 U. C. C. P. 275.

(y) *Ibid.*

days, or payment of £5 and costs. (z) So a conviction by two justices, for taking lumber feloniously or unlawfully, is bad. (a) For if the act be unlawful only, not felonious it should be shown how it is unlawful, and it should show also that the offence comes under our statute, which gives the justices power to convict. (b) The name of the owner should also be stated, and not merely that the lumber is "the property of another." (c)

The petitioner was convicted by a court martial, held at the city of Montreal on the 26th, 27th, 28th and 29th days of March, 1867, and on the 1st and 2nd days of April, 1867, on the following charge: "for disgraceful conduct, in having at Montreal, Canada East, some time between the 17th January and 16th March, 1867, fraudulently embezzled or misapplied about five hundred cords of wood, government property intrusted to his charge as an assistant commissariat storekeeper, and which, at the latter date, was found deficient," and thereupon, on the said conviction, the court forthwith sentenced the petitioner, among other penalties, to be imprisoned with hard labor for six hundred and seventy-two days. The court held that it did not appear there had been preferred against the petitioner any specific charge, nor any conviction of him upon a specific or positive charge, but a conviction in the alternative, one of the two being no offence created by the 17th article of the Mutiny Act, without any certainty as to either of the two charges in the disjunctive, and that this was a matter of substance, and therefore the warrant of commitment was null and void, and the petitioner, who had been committed to prison, was entitled to be set at liberty. (d)

In describing the offence in convictions, it is not sufficient to state, as the offence, that which is only the legal result of certain facts, but the facts themselves must be specified, so

(z) *Reg v. Wortman*, 4 Allen, 73.

(a) *Reg. v. Craig*, 21 U. C. Q. B. 552.

(b) *Ibid.*

(c) *Ex parte Holder*, 6 Allen, 338.

(d) *Re Moore*, 11 L. C. J. 94.

that the court may judge whether they amount in law to the offence. And the conviction must contain the judgment on which it is based, and a statement that the conviction results from proof that the defendant has sold spirituous liquors without license is not sufficient. (e)

Thus a conviction by a magistrate stated that defendant did, on, etc., at, etc., being a public highway, use blasphemous language contrary to a certain by-law passed almost in the words of the Con. Stats. U. C., c. 54, s. 282, subs. 4, but there was no statement of the particular language used ; it was held bad, as the statement in the conviction was only the legal result of certain facts, and the facts themselves were not set out. (f) The particular words used should have been stated.

As a general rule, where an Act in describing the offence makes use of general terms, which embrace a variety of circumstances, it is not enough to follow in a conviction the words of the statute ; but it is necessary to state what particular fact prohibited has been committed. But in framing a conviction, it is in general sufficient to follow the words of the statute, where it gives a particular description of the offence. Where a particular Act creates the crime, it may be enough to describe it in the words of the legislature, but where the legislature speaks in general terms, the conviction must state what act in particular was done by the party offending, to enable him to meet the charge. (g)

A conviction which charged that the prisoner did, "unlawfully and maliciously, cut and wound one Mary Kelly, with intent to do her grievous bodily harm," though not sufficient to charge a felony under s. 17 of 32 & 33 Vic., c. 20, is good for a misdemeanor under s. 19, the statement of the intent being rejected as surplusage. (h) And the police magistrate has jurisdiction over both these offences. (i)

(e) *Duboirs v. Boivin*, 14 L. C. J. 203.

(f) *Re Donnelly*, 20 U. C. C. P. 165.

(g) *Re Donnelly*, 20 U. C. C. P. 167, per *Hagarty*, C. J. ; and see *Rex v. Sparling*, 1 Str. 497 ; *Reg. v. Scott*, 4 B. & S. 368 ; *Reg. v. Nott*, 4 Q. B. 768 as to particular applications of these principles.

(h) *Re Boucher*, 4 Ont. App. 191.

(i) *Ibid.*

A conviction under R. S. O., c. 142, s. 40, which omitted to state that the party practised "for hire, gain or hope of reward," was quashed. (ii)

A conviction under a by-law must show the by-law, (j) and also by what municipality it was passed, (k) that the court may judge of its sufficiency; and it is doubtful whether its date must not appear. (kk)

If the statute on which the by-law is based does not clearly give authority to fine or imprison, a conviction imposing a penalty will be quashed. (l)

And where a conviction purported to be for an offence against a by-law, but the by-law showed no such offence, it was quashed, and would not be supported as warranted by the general law. (m)

Where it appears by the conviction that the defendant has appeared and pleaded, and the merits have been tried, and the defendant has not appealed against the conviction, it cannot be vacated for any defect of form whatever. The construction must then be such a fair and liberal one as is agreeable to the justice of the case. (n)

It is no ground for quashing a conviction that evidence has been improperly received of a similar offence on another day than that charged, if there is ample evidence without it to sustain the conviction, and the prosecution made no use of it against the prisoners. (o)

And the court will not quash a conviction on the weight or upon a conflict of evidence, but there must be reasonable evidence to support it, such as would be sufficient to go to the jury upon a trial. (p)

(ii) *Reg. v. Hersel*, 44 U. C. Q. B. 51.

(j) *Reg. v. Ross*, Rob. & Jos. Dig. 1979.

(k) *Reg. v. Osler*, 32 U. C. Q. B. 324.

(kk) *Ibid.*

(l) *Ex parte Brown*, 18 L. C. J. 194.

(m) *Re Bates*, 40 U. C. Q. B. 284; and see *Reg. v. Washington*, 46 U. C. Q. B. 221.

(n) 32 & 33 Vic., c. 31, s. 73; *Reg. v. Carwell*, 33 U. C. Q. B. 310, per Wilson, J.

(o) *Reg. v. Mailloux*, 3 Pugsley, 493.

(p) *Reg. v. Howarth*, 33 U. C. Q. B. 537.

In Quebec a conviction against a bailiff for exacting more than his legal fees was quashed, because no precise date of the offence was given. (q)

A conviction on a charge of having disturbed the public peace by insulting a person and by committing an assault upon him, and by crying out and threatening to beat him, was quashed, as it did not appear to be warranted by any law or statute in such case provided. (r) But the authority of this may be doubted.

By the 32 & 33 Vic., c. 31, s. 25, every complaint shall be for one matter of complaint only, and not for two or more offences. Therefore, a conviction for that the defendant "did in or about the month of June, 1880, on various occasions" commit the offence charged in the information, and a fine was inflicted "for his said offence," was held bad. (s)

A conviction for a penalty, to be paid "forthwith within thirty days," is good. (t)

Where, by a first statute, the penalty of two months' imprisonment, "with or without hard labor," was imposed, and by a second statute the time was extended to six months, without mentioning hard labor, it was held that the alteration was equivalent to a new statute, and that a conviction under the latter, imposing six months' imprisonment with hard labor, was bad. (u)

The legal effect of reversing or annulling a conviction is to render the sentence and imprisonment illegal, and not as for a crime. The rule has been laid down that when judgment, pronounced upon a conviction, is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused; restored in his credit, his capacity, his blood and his estates, with regard to which last, though they be granted away by the Crown, yet

(q) *Ex parte Nutt*, 6 L. C. R. 488.

(r) *Ex parte Rouleau*, 17 L. C. J. 172.

(s) *Reg. v. Clennan*, 8 U. C. P. R. 418.

(t) *Reg. v. McGowan*, 6 Allen, 64.

(u) *Ex parte Williams*, 19 L. C. J. 120.

the owner may enter upon the grantee with as little ceremony as he might enter upon a disseizor. (v)

Where a conviction, which had been affirmed on appeal to the sessions, was brought up by *certiorari*, contrary to the 32 & 33 Vic., c. 30, s. 71, as amended by the 33 Vic., c. 27, s. 2, which enacts that in such case no *certiorari* shall issue; it was held that although the conviction was clearly bad, the court could not quash it, for the case was one in which the justice had jurisdiction, and the court were not asked to do anything to enforce the conviction, and no motion had been made to quash the *certiorari*. (w)

It would seem that a conviction by a justice may be quashed, unless it is sealed. (x)

A conviction will be quashed, if it appears that the defendant was not put on his defence or allowed to cross-examine the witnesses, (y) or where the justice has no jurisdiction. (z)

So, if the summons state no place where the offence was committed, although the place appear on the face of the conviction; (a) and a conviction for two offences incurring penalties should specify for each offence the time, place, and penalty. (b)

Although a conviction is a defence to another proceeding for the same offence, yet a conviction fraudulently obtained before a different magistrate, for the purpose of defeating the prosecution, cannot avail for that end. (c)

Justices have no power to award costs on conviction unless expressly given them by statute, (d) and where they are so empowered, they must specify the amount. (e)

(v) *Davis v Stewart*, 29 U. C. Q. B. 446, per *Wilson*, J.; 4 Bla. Com. 393.

(w) *Reg. v. Johnson*, 30 U. C. Q. B. 423.

(x) *Haacke v. Adamson*, 14 U. C. C. P. 201; see also *Macdonald v. Stuckey*, 31 U. C. Q. B. 577; 32 & 33 Vic., c. 31, s. 42.

(y) *Ex parte Lindsay*, Rob. Dig. 73.

(z) *Reg. v. Taylor*, 8 U. C. Q. B. 257.

(a) *Ex parte Leonard*, 6 L. C. R. 480.

(b) *Ex parte Paige*, 18 L. C. J. 119.

(c) *Reg. v. Roberts*, 5 Allen, 531.

(d) *Reg. v. Lennan*, 44 U. C. Q. B. 456.

(e) *Ex parte Hartt*, 3 Allen, 122; *Dickson v. Crabbe*, 24 U. C. Q. B. 494; *Moffatt v. Barnard*, 24 U. C. Q. B. 498; and see 32 & 33 Vic., c. 31, s. 55.

There is no such general power as to costs on a conviction under an Ontario Act ; and where not given by the statute itself, the conviction cannot be amended. (*f*) In New Brunswick, however, a conviction for breach of a by-law of the city of Fredericton, defective in this respect, was amended by deducting the amount of costs so improperly imposed, and allowing the conviction to stand for the balance. (*g*)

Where there is a conviction against several, and the magistrate has power to award costs, he should apportion them, and not charge the full amount against each. (*h*)

A general power to grant costs on a conviction does not necessarily empower justices to impose the costs of commitment and conveying the prisoner to gaol ; and the forms of conviction given in the statutes are applicable only where such authority exists. (*i*) But a defect of this nature, it has been held in New Brunswick, may be amended. (*j*)

The Summary Convictions Act, 32 & 33 Vic., c. 31, empowers justices to award costs either on dismissal of the complaint or on conviction, which may be recovered in the same manner as are penalties under the Act, viz., by distress, and in default of distress by imprisonment, with or without hard labor, for any time not exceeding one month, unless the costs be sooner paid, (*k*) and may also award the costs of commitment and conveying the prisoner to gaol.

Before a prisoner can be imprisoned under this statute, a distress must be issued and returned ; (*l*) and the costs of commitment, etc., must be specified in the warrant. (*m*)

It is no objection to a warrant of distress that the costs of conveying the defendants to gaol, in the event of imprisonment in default of distress, were specified in the conviction ; or that the costs of such conveying were mentioned in the

(*f*) *Reg. v. Lennan*, *supra*.

(*g*) *Ex parte Mowry*, 3 Allen, 276.

(*h*) *Parsons q. t. v. Crabbe*, 31 U. C. C. P. 151.

(*i*) *Reg. v. Harshman*, Stev. Dig. 822.

(*j*) *Ibid.* 821.

(*k*) Secs. 54 *et seq.* ; *ex parte Ross*, 2 Pugsley & B. 337.

(*l*) *Reg. v. Blakeley*, 6 U. C. P. R. 244.

(*m*) Sec. 62.

warrant of distress, for it authorized a distress only for the penalty and costs of conviction. (n)

A conviction is bad which orders imprisonment in default of immediate payment of a sum of money, when the by-law upon which it is based is in the alternative, imposing a fine or imprisonment. A conviction is also bad which gives costs, when the by-law upon which it is based gives no jurisdiction as to costs. (o)

A judgment for too little is as bad as a judgment for too much ; and a conviction for one month instead of two months is therefore bad. (p)

A conviction inflicting one penalty for two offences is bad. (q) And where a statute prescribes a definite penalty for an offence, the imposition of a penalty other than the one prescribed is irregular and fatal. (r)

Where no other mode is provided, a prosecution for a penalty may be in the name of the Queen. (s)

Where the defendant is summarily convicted at one time of several offences, the justice has power, under 32 & 33 Vic., c. 31, s. 63, to award that the imprisonment, under one or more of the convictions, shall commence at the expiration of the sentence previously pronounced. (t)

Under the 7 & 8 Geo. IV., c. 28, the practice of the judges was, where more than one case of felony was established against a man, and he was convicted of them at one and the same time, to make the sentence of imprisonment for the two or three offences, as the case might be, commence at the expiration of the sentence first awarded. (u)

In respect to warrants committing prisoners on charges of offences committed, it has been held not necessary to state

(n) *Reid v. McWhinnie*, 27 U. C. Q. B. 289.

(o) *Ex parte Marry*, 14 L. C. J. 163.

(p) *Ex parte Slack*, 7 L. C. J. 6.

(q) *Corignan v. Harbour Comrs. Montreal*, 5 L. C. R. 479.

(r) *Ex parte Wilson*, 1 Pugsley & B. 274.

(s) *Reg. v. Armstrong*, 6 Allen, 81.

(t) *Reg. v. Cutbush*, L. R. 2 Q. B. 379.

(u) *Ibid.* 382, per Cockburn, C. J.

on the face of them that the justice had information on oath which could justify him in binding the defendant to keep the peace. (v)

A warrant of commitment must state the place where the offence was committed, otherwise it will be defective, (w) and a verbal warrant of commitment is bad. (x)

It is a general rule, that, where a man is committed for any crime, either at common law, or created by Act of Parliament, for which he is punishable by indictment, then he is to be committed until discharged by due course of law. But where the committal is in pursuance of a special authority, the terms of the commitment must be special, and must exactly pursue that authority. (y)

It is not necessary that, in the warrant of commitment, the offence should be described with the nicety and technical precision of an indictment; but the prisoner should be charged with some legally defined and well-known offence, for which he would be subjected to criminal proceedings, either by indictment or otherwise, and that specific offence cannot be included under a general term, which compendiously covers a great variety of criminal offences. (z)

As the term felony includes a number of crimes, ranging between treason and larceny, it is not sufficient simply to designate the offence by the name of the class of offences to which the justice may find or judge it to belong.

A commitment, in the absence of any statutory provisions prescribing its forms and contents, should state the facts charged to constitute the offence with sufficient particularity to enable the court or judge, on *habeas corpus*, to determine what particular crime is charged against the prisoner; and if it fail to do this, the prisoner ought to be discharged. (a)

A warrant was held bad which charged that the defendant

(v) *Dawson v. Fraser*, 7 U. C. Q. B. 391.

(w) *Re Beebe*, 3 U. C. P. R. 270.

(x) *Campbell v. Flewelling*, 2 Pugsley, 403.

(y) *Re Anderson*, 11 U. C. C. P. 54.

(z) *Reg. v. Young, the St Alban's Raid*, 3, per Badgley, J.

(a) *Ibid.* 3, per Badgley, J.

did embezzle in the county of Grey, while the magistrate was acting in and for the county of Oxford, and which did not show that the defendant had the embezzled property with him in the county of Oxford according to 32 & 33 Vic., c. 21, s. 121, or that he was, or resided, or was suspected of being or residing within the jurisdiction of such magistrate, according to 32 & 33 Vic., c. 30, s. 1. (b)

A commitment with hard labor, on a conviction warranting only imprisonment without hard labor, is bad. (c)

Defects in stating an offence in a warrant of commitment are not fatal, for there is not the same necessity for adherence to technical terms as in an indictment; and upon the return to a *habeas corpus*, it is the evidence, which is the foundation of the warrant, the court looks at, when the evidence is before them on a *certiorari*, rather than the warrant itself; and when a legal cause for imprisonment appears on the evidence, the ends of justice are not allowed to be defeated by a want of proper form in the warrant, but the court will rather see that the error is corrected and amend the warrant. (d)

Justices should not omit any part of a prescribed form of commitment, lest the part omitted be material, and render the warrant void. (dd)

When a justice follows the words used by the legislature, the court will hold that he intended them in the same sense; but if he uses other words, he ought to be more precise. (e) It is, however, the duty of the court to take care that, in all cases brought before them, justices shall have the full protection to which the law entitles them. (f)

A warrant of commitment under 31 Vic., c. 16, signed by one qualified justice of the peace, and by an alderman who has not taken the necessary oath, is invalid to uphold the

(b) *McGregor v. Scarlett*, 7 U. C. P. R. 20.

(c) *Reg. v. Yeomans*, 6 U. C. P. R. 66.

(d) *Re Anderson*, 20 U. C. Q. B. 162; *Rex v. Marks*, 3 East, 57; *Reg. v. Murray*, 2 L. C. L. J. 87.

(dd) *Re Beebe*, 3 U. C. P. R. 373.

(e) *Re Anderson*, 11 U. C. C. P. 63.

(f) *Croukhite v. Sommerville*, 3 U. C. Q. B. 131, per Robinson, C. J.

detention of a prisoner confined under it, though it might be a justification to a person acting in virtue of it, if an action were brought against him. (g)

The 32 & 33 Vic., c. 31, s. 86, provides that, after a case has been heard and determined, one justice may issue all warrants of distress or commitment thereon.

By s. 87, it shall not be necessary that the justice who acts before or after the hearing be the justice, or one of the justices, by whom the case is or was heard and determined. It is therefore not necessary that a warrant of distress or commitment should be signed by two justices, though two are required to convict; nor is it necessary that the justice who commits should also have heard and determined. (h)

The issuing of a warrant of commitment, under 32 & 33 Vic., c. 31, s. 75, is discretionary and not compulsory upon a justice of the peace. The court will, therefore, upon this ground, as well as upon the ground that the person sought to be committed has not been made a party to the application, refuse a *mandamus* to compel the issue of the warrant. (i)

The Con. Stats. U. C., c. 126, s. 6, now embodied in R. S. O., c. 73, s. 6, was passed expressly for the protection of justices of the peace; and when it is desired to compel a justice to issue a warrant of commitment against a person, proceedings should not be taken by *mandamus*, but a rule should be issued, under this clause, and the person to be affected should be made a party to the rule. (j)

Where the defendant, a justice of the peace, issued his warrant, under Con. Stats. Can., c. 103, s. 67, to commit the plaintiff for thirty days, for non-payment of the costs of an appeal to the Quarter Sessions, unless such sum and all costs of the distress and commitment, and conveying the party to gaol, should be sooner paid, but omitted to state in the warrant the amount of the costs of distress, commitment and

(g) *Reg. v. Boyle*, 4 U. C. P. R. 256.

(h) *Re Crow*, 1 U. C. L. J. N. S. 302.

(i) *Re Delaney v. Macnab*, 21 U. C. C. P. 563.

(j) *Re Delaney v. Macnab*, 21 U. C. C. P. 563.

conveyance to gaol; it was held, that it was the duty of the justice to ascertain and state the amount of these costs; yet the omission to do so, though it might have occasioned the plaintiff's discharge, did not show either a want or excess of jurisdiction. The warrant, however, was irregular in omitting these particulars, and there was consequently an irregular exercise of jurisdiction. (*k*)

Where an Act, passed by the Provincial Legislature, was subsequently disallowed by Her Majesty, but, while it was in force, the plaintiff had been convicted under it by the defendants, as justices of the peace, and directed to pay a fine, to be levied according to the Act, and, the fine not having been paid, a warrant was properly issued by the defendants for his arrest and imprisonment, which, however, was not executed by the officer to whom it was directed until after the disallowance of the Act was published in the *Gazette*, and from its publication only the Act ceased: it was held, that the defendants were justified in making the conviction and issuing the warrant, and could not be held liable by reason of the warrant being executed after the operation of the Act had been determined. (*l*)

The warrant of commitment should show before whom the conviction was had. It lies on the party alleging the sufficiency of the conviction to sustain the commitment, to produce the conviction. (*m*)

Where a prisoner is in custody of a gaoler, under several warrants, the magistrate cannot withdraw them, or any of them, from the gaoler's hands, because they are for his protection; but the gaoler ought to know which is the operative warrant, otherwise he may not know whether he is to discharge the prisoner from custody at the end of the time specified in one or in the other. (*n*)

(*k*) *Dickson v. Crabb*, 24 U. C. Q. B. 494.

(*l*) *Clapp v. Lawrason*, 6 U. C. Q. B. O. S. 319; see 31 Vic., c. 1, s. 7, thirty-fifthly, sixthly and seventhly.

(*m*) *Re Crow*, 1 U. C. L. J. N. S. 302; 1 L. C. G. 189.

(*n*) *Re McKinnon*, 2 U. C. L. J. N. S. 329.

A warrant ought to set forth the day and year wherein it was made, and it is safe, but perhaps not necessary, in the body of the warrant, to show the place where it is made, yet it seems necessary to set forth the county in the margin, at least, if it be not set forth in the body.

In strictness, it is not indispensable that the authority of the magistrate should be shown on the face of the warrant, for the omission may be shown by averment and parol evidence. A commitment must be in writing, under the hand and seal of the person by whom it is made, expressing his office or authority, and the time and place at which it is made, and must be directed to the gaoler or keeper of the prison. (o)

A final commitment, for want of sureties to keep the peace, must be in writing. Where, however, a person having been brought up before a justice on a charge of threatened assault, was ordered by the justice to find sureties to keep the peace, and he offered bail, who were rejected as not being householders, and, being thus prevented from immediately obtaining bail, remained in custody of a police constable for three hours, during which time the justice frequently visited him to ascertain if he had found bail, and at night he was taken to the gaol, remaining there until the following morning, when he was discharged on bail being procured; it was held that this was not a final commitment for want of sureties, and that, consequently, it did not require a written warrant, for the detention was no longer than might be reasonably necessary for ascertaining whether the party could find some one who would become his surety. (p) The time allowed for this purpose must always depend on the circumstances of each case. (q)

A commitment in default of sureties to keep the peace should show the date on which the words were alleged to

(o) *Reg. v. Reno*, 4 U. C. P. R. 292, per *Draper*, C. J.

(p) *Lynden v. King*, 6 U. C. Q. B. O. S. 566.

(q) *Ibid.*

have been spoken, and contain a statement to the effect that complainant is apprehensive of bodily fear. (r)

When articles of the peace have been exhibited in open court against a person, the court will direct that he do stand committed until security to keep the peace be given. (s)

Where a prisoner is committed to be held until discharged by due course of law, the warrant continues in force until the prisoner is discharged or sent to the penitentiary. It is sufficient, therefore, if at the circuit the judge remands verbally a prisoner into the custody of the proper officer in court. (t) Where, in the course of a civil action, the judge is of opinion that forgery or perjury has been committed, he will, as a matter of duty, order that the defendant be prosecuted for these crimes. (u) The 41 Vic., c. 19, makes provision for the discharge in certain cases of persons who have been confined for the period of two weeks in default of sureties for the peace.

Sometimes, in cases of indictable offences, an inquisition is taken by a coroner, and the prisoner is committed for trial on the verdict of the coroner's jury. The finding of a coroner's inquest is equivalent to the finding of a grand jury, and a defendant may be prosecuted for murder or manslaughter upon an inquisition, which is the record of the finding of a jury sworn to inquire into the death of the deceased, *super visum corporis*. Such an inquisition amounts to an indictment. (v)

And where, on an indictment for manslaughter, the grand jury had found "no bill," it was held that the Crown had the right to have the prisoner arraigned and tried on the finding of the coroner's jury. (w)

A coroner's duty is judicial, and he can only take an

(r) *Re Ross*, 3 U. C. P. R. 301.

(s) *Reg. v. Vendette*, 8 L. C. J. 284.

(t) *Reg. v. Mulholland*, 4 Pugsley & B. 476.

(u) *Content v. Lamontagne*, 17 L. C. J. 319.

(v) *Reg. v. Ingham*, 5 B. & S. 257; 33 L. J. (Q. B.) 183; Arch. Cr. Pldg. 116.

(w) *Reg. v. Tremblay*, 18 L. C. J. 158.

inquest *super visum corporis*; and an inquest where the coroner and jurors were not present at the same time was held void. (x)

Where a coroner's finding on an inquisition does not disclose with certainty any offence against the person who caused the death, yet is so worded as to leave the matter in doubt, as if it found that one G. "did feloniously and maliciously kill and slay one M., against the peace, etc., in self-defence of him, the said G.," the court will quash it on the application of G. (y) But if no crime is disclosed, the court will not quash the finding on the application of a person on whose medical skill it reflects unfavorably (z) On such an application the propriety of entitling the matter "the Queen against" the applicant has been doubted. (a)

A finding of manslaughter which omits the words "feloniously" and "slay," is bad, and will be quashed on a rule. (b) And a coroner's warrant reciting the inquisition, and stating the offence to be that the prisoner "did stand charged with having inflicted blows on the body of the said" deceased, and not showing the place where the blows, if any, were inflicted, or where the offence, if any, was committed, was held defective. (c)

An inquest held by a coroner on a Sunday, being a judicial act, is invalid. (d) A coroner cannot take a second inquisition on the same body, the first inquisition being valid and subsisting. (e)

A barrister cannot insist on being present at a coroner's inquest, and upon examining and cross-examining the witnesses. (f)

Imprisonment is imposed for different purposes. It may

(x) *Ex parte Wilson*, Stev. Dig. 335.

(y) *Reg. v. Golding*, 39 U. C. Q. B. 259.

(z) *Reg. v. Farley*, 24 U. C. Q. B. 384.

(a) *Ibid.*

(b) *Ex parte Brydges*, 18 L. C. J. 141.

(c) *In re Carmichael*, 10 U. C. L. J. 325.

(d) *Re Cooper*, 6 U. C. L. J. N. S. 317.

(e) *Reg. v. White*, 7 U. C. L. J. 219; 3 E. & E. 137; 27 L. J. (Q. B.) 257.

(f) *Agnew v. Stewart*, 21 U. C. Q. B. 396.

be for prevention, as by a constable, to hinder a fray, or by any person, to restrain a misdemeanor or prevent a felony, or for security in criminal cases, before investigation or trial, or until sureties for the peace are given ; or in coercion, to ensure the performance of some particular act, as in cases of actual contempt, until the contempt be purged, and in cases of supposed contempt, as for not making a return of legal process, or for not paying over moneys raised by such process, by officers of the court, until return of payment is made, and to enforce the payment of pecuniary fines, or punitive, as in criminal sentences. (g)

Where a party, undergoing an imprisonment on conviction of felony, has been released on bail in consequence of the issue of a writ of error, and such writ of error is subsequently quashed, he may be reimprisoned for the unexpired term of his sentence on a warrant of a judge of the Court of Queen's Bench, signed in chambers, and granted in consequence of the court having ordered process to issue to apprehend such party and bring him before the court, "or before one of the justices thereof, to be dealt with according to law." (h)

The period of a man's imprisonment must be certain, and not dependent on the will of the officer who is charged with the imprisonment. Every judicial act is supposed to happen the first instant of the day it takes place. The imprisonment of a person, therefore, is deemed to commence at the beginning of the day on which he was adjudged to be imprisoned, and he will be entitled to his discharge, not at the same hour of the day he was brought to prison, but on the first opening of the prison on the day after his imprisonment expired. (i)

An adjudication mentioned in the margin of the warrant of commitment, where there are several warrants each for a distinct period of imprisonment, that the term of imprisonment mentioned in the second and third warrants shall commence at the expiration of the time mentioned in the warrant

(g) *McInnes v. Davidson*, 4 U. C. P. R. 189, per A. Wilson, J.

(h) *Ex parte Spelman*, 14 L. C. J. 281.

(i) *Reg. v. Scott*, 2 U. C. L. J. N. S. 324, per J. Wilson, J.

immediately preceding, is valid. An adjudication so stated in the margin properly forms a part of the warrant, and, even if the portions in the margin of the second and third warrants could not be read as parts of these warrants, the periods of imprisonment would nevertheless be quite sufficient, the only difference being that all the warrants would be running at the same time, instead of counting consecutively. (*j*)

It is not necessary, before a defendant convicted of assault is imprisoned, that he should be served with a copy of the minute of conviction. The 32 & 33 Vic., c. 31, which might require this to be done before a warrant of commitment could issue, applies only to orders of justices, not to convictions. A party convicted of an offence is bound to take notice of the terms of the conviction at his peril. (*k*)

A witness who, on the usual application, has been ordered to withdraw from the court room, is guilty of contempt if, after his examination, he communicates facts disclosed in evidence at the trial to another witness not examined at the time of the disclosure. (*l*) In this case the rule for attachment was discharged, the defendant swearing, in answer, that he did not enter the court room during the trial till called as a witness; that he communicated the fact without any intention of influencing the evidence to be given by the witness, or of committing a contempt of court, and in utter ignorance of there being any impropriety in so doing. The affidavit further stated that the deponent was wholly unconscious of the possibility of his conduct being considered a contempt.

If a witness absent himself a bench warrant may be issued, which, if tested in open session and signed by the clerk of the peace, is not invalid for want of a seal; (*m*) and the witness may be committed for contempt. But an attach-

(*j*) *Re Crow*, 1 U. C. L. J. N. S. 302; 1 L. C. G. 189; see 32 & 33 Vic., c. 31, s. 63.

(*k*) *Reg. v. O'Leary*, 3 Pugsley, 264.

(*l*) *Reg. v. McCorkill*, 8 L. C. J. 282.

(*m*) *Fraser v. Dickson*, 5 U. C. Q. B. 231.

ment will not be granted against a witness for not obeying a subpoena unless there is a clear case of contempt ; but if his absence is wilful, the court will not, in general, look to the materiality of his testimony. (n)

A subpoena to attend on the 10th September, and so from day to day, was served on the 11th September, and the witness attended for several days, and knew that the case was not tried ; he was held guilty of contempt in subsequently absenting himself. Where a witness accepted the conduct money, and went with the person who served him with the subpoena, and remained at the court several days, an attachment was granted against him for subsequently absenting himself, though he and another person swore, in contradiction to the party who served the subpoena, that the original was not shown to him, and he also swore that he attended the court as a juror, and left in consequence of ill health with the intention of returning, his absence appearing to be wilful. (o)

Where a party is served with a subpoena to attend as a witness, and accepts a sum of money which is tendered to him for his expenses without objecting to the amount, but refuses to attend on account of his own business, he is liable to an attachment for the non-attendance, even though the sum tendered be less than he is entitled to receive. (p) But if he had objected to the sum when tendered, it would have been an answer to the application. (q)

It is not necessary to show that the witness was called on his subpoena, if it is shown by other satisfactory evidence that he did not attend. (r)

An attempt by a third person to prevent a suitor from laying his case before the court, by threats of bringing him into disgrace and disrepute, is a contempt of court, and subjects the offender to a heavy fine. (s)

(n) *Meloney v. Morrison*, 1 Allen, 240.

(o) *Johnson v. Williston*, 2 Allen, 171.

(p) *Gilbert v. Campbell*, 1 Hannay, 258.

(q) *Ibid.*

(r) *Meloney v. Morrison*, 1 Allen, 240.

(s) *Re Mulock*, 13 W. R. 278 ; 1 L. C. G. 25.

A frivolous opposition, made to retard a judicial sale, is a contempt of court. (t)

An advocate who publishes in a public newspaper letters containing libellous, insulting and contemptuous statements, and language concerning one of the justices of the court, in reference to the conduct of said justice while acting in his judicial capacity, on an application made to him in chambers for a writ of *habeas corpus*, is guilty of contempt. (u)

In this case it was held in the Privy Council, reversing the judgment of the Court of Queen's Bench for Quebec (Crown side), that a judge of the Court of Queen's Bench, in Quebec, whilst sitting alone, in the exercise of the criminal jurisdiction conferred upon him by Con. Stats. L. C., c. 77, s. 72, has no power to pronounce such advocate in contempt for conduct of the above description, or to impose a fine; and that the proceedings for such contempt could only be legally and properly taken in the full Court of Queen's Bench. (v)

An order was made for the delivery of infant children by the father to the mother. On an application to commit the father for a contempt in not obeying this order, it appeared that, in his absence from home, the children had been removed from his house and taken to the United States by his son, aged fifteen. They denied collusion, the son saying that he acted without his father's knowledge or consent, but the father took no steps to bring the children back, and did not offer to do so if time were given him. To a demand made for the children, the father replied that they were not in his custody; but it was held that he was not excused from obeying the order, and was in contempt. (w)

Affidavits disingenuously drawn up, with a view of presenting inferences, and giving color to the transactions to which they refer inconsistent with the whole truth, even

(t) *Thomas v. Pepin*, 5 L. C. J. 76.

(u) *Reg. v. Ramsay*, 11 L. C. J. 152; S. C. L. R. 3 P. C. App. 427.

(v) *Ibid.*

(w) *Reg. v. Allen*, 5 U. C. P. R. 453.

though true as far as they go, should be read with suspicion and carry but little weight. (x)

A contempt of court being a criminal offence, no person can be punished for such unless the specific offence charged against him be distinctly stated, and an opportunity given him of answering. (y)

To contempts of court committed by an individual in his personal character only, there has been attached by law, and by long practice, a definite kind of punishment by fine and imprisonment. (z)

An order suspending an attorney, and barrister of the Supreme Court of Nova Scotia, from practising in that court, for having addressed a letter to the Chief Justice reflecting on the judges and the administration of justice generally in the court, was discharged by the judicial committee of the Privy Council, as it substituted a penalty and mode of punishment which was not the appropriate and fitting punishment for the offence. The letter, though a contempt of court and punishable by fine and imprisonment, having been written by a practitioner, in his individual and private capacity as a suitor, in respect of a supposed grievance as a suitor, of an injury done to him as such suitor, and having no connection whatever with his professional character, or anything done by him professionally either as an attorney or barrister, it was not competent for the Supreme Court to go further than award to the offence the customary punishment for contempt of court, or to inflict a professional punishment of indefinite suspension for an act not done professionally, and which, *per se*, did not render the party committing it unfit to remain a practitioner of the court. (a)

The power to punish for contempt is inherent in all courts, and is a necessary condition of their existence. In Canada, this power is not confined to contempt in the face of the

(x) *Reg. v. Allen*, 5 U. C. P. R. 453.

(y) *Re Pollard*, L. R. 2 P. C. App. 106.

(z) *Re Wallace*, L. R. 1 P. C. App. 295, per Lord Westbury.

(a) *Ibid.* 283; 1 Oldright, 654.

court, or to pending cases, or to resistance to process ; but it extends to the punishment of all contemptuous publications, calumniating or misrepresenting its judicial opinions as a court, or the opinion or order of any judge of the court, pronounced or made either in term or in vacation, whether in chambers, or at his own residence, or in any other place, where, within the jurisdiction of the court, he may be called upon to perform any judicial duty, and to all publications tending to cast ridicule or odium upon the court or any of its judges, in reference to their judicial acts, or to impair the respect and confidence of the public in the purity and integrity of the tribunal or any of its members. (b)

An attachment against a sheriff for not obeying a rule to bring in the body, cannot be granted in vacation by a single judge at chambers. (c)

Where an attorney of this court, practising in an inferior court, has charged, and the judge has allowed, costs clearly not sanctioned by law, this court will punish by fine and attachment. (d)

A rule for attachment for a contempt of court, committed during term, can be moved for on the last day of such term, and it is no objection that it is made returnable next term. The rule will be discharged if headed "*In re*," etc., when there was no such matter depending in court. (e)

Any court of record has power to fine and imprison for contempts committed in the face of the court. (f) It seems the commitment may be made *sedente curia*, by oral command without any warrant made at the time. This proceeds on the ground that there is, in contemplation of law, a record of such commitment, which may be drawn up when necessary. (g)

(b) *Reg. v. Ramsay*, 11 L. C. J. 158.

(c) *Rex v. Sheriff of Niagara*, Draper, 343.

(d) *Rex v. Whitehead*, Taylor, 476.

(e) *Re Ross*, 2 Russell & Chesley, 506.

(f) *Armstrong v. McCaffrey*, 1 Haunay, 517.

(g) *Ovens v. Taylor*, 19 U. C. C. P. 53, per Hagarty, J.

A Provincial Legislature has not the power to order the arrest of any one for contempt. (h)

The proceedings on a rule for contempt do not constitute a criminal case, so as to allow a writ of error with respect to such rule. (i)

Justices of the peace, acting judicially in a proceeding in which they have power to fine and imprison, are judges of record, and have power to commit to prison orally, without warrant, for contempt, committed in the face of the court. (j)

Thus, if the justice be called a "rascal, and a dirty mean dog," a "damned lousy scoundrel," a "confounded dog," etc., the justice has a right to imprison as often as the offence is committed. But the commitment must be for a specified period. (k)

And where a prisoner was convicted three several times on the same day for using opprobrious epithets to a justice, while in the execution of his office, and detained in prison under three several warrants, all dated the same day, the periods of imprisonment in the two last commencing from the expiration of the one preceding it, but the first to be computed "from the time of his arrival and delivery (by the bailiff) into your (the gaoler's) custody thenceforward," it was held that although the justice had a right to convict and sentence for continuing periods, and to make the period of imprisonment on the second and third adjudications begin at the termination of the first imprisonment, yet, as the first period of imprisonment was depending on the will of the officer who was to convey to gaol, it was therefore uncertain, and the other periods of imprisonment depending on the same contingency were likewise uncertain, and the prisoner was entitled to his discharge. (l)

A justice of the peace, while sitting in discharge of his

(h) *Ex parte Cote*, 6 *Revue Leg.* 582.

(i) *Ramsay v. Reg.*, 11 L. C. J. 158.

(j) *Armstrong v. McCaffrey*, 1 *Hannay*, 517; *Jones v. Glassford*, Rob. & Jos. Dig. 1974.

(k) *Jones v. Glassford*, *supra*; *Dawson v. Fraser*, 7 U. C. Q. B. 391.

(l) *Ibid.*

duty, has power, without any formal proceeding, to order at once into custody, and cause the removal of any party who, by his indecent behavior or insulting language, is obstructing the administration of justice, or may commit him until he finds sureties to keep the peace. But he has no power, either at the time of the misconduct, much less on the next day, to make out a warrant to a constable, and to commit the offending party to gaol for any certain time, by way of punishment, without adjudging him formally, after a summons to appear for hearing to such punishment on account of his contempt, and a hearing of his defence, and making a minute of such sentence. (m)

It has been doubted whether a justice of the peace, executing his duty in his own house, and not presiding in any court, can legally punish for a contempt committed there. (n)

A commitment by a justice for a contempt, if there be no recorded conviction, should show that the party was convicted of the contempt. And stating that he is charged with it is insufficient; at any rate, the evidence should in some way show the fact of conviction, and the manner of it. (o)

A warrant to a constable to commit for contempt, containing a direction to detain the party till he shall pay the costs of his apprehension and conveyance to gaol, is defective. For the statute 3 James I., c. 10, only authorizes such expenses to be levied of the offender's goods; and if he could be imprisoned till he paid them, it would be necessary that the amount of such expenses should be stated, or the gaoler would not know when he might discharge him.

Where a power resides in any court or judge to commit for contempt, it is the peculiar privilege of such court or judge to determine upon the facts, and it does not properly belong to any higher tribunal to examine into the truth of the case. (p) Therefore the court, in adjudicating on a case of contempt,

(m) *Re Clarke*, 7 U. C. Q. B. 223.

(n) *McKenzie v. Newburn*, 6 U. C. Q. B. O. S. 486.

(o) *Ibid.*

(p) *Re Clarke*, 7 U. C. Q. B. 223.

will not enter into the truth of the alleged facts constituting the contempt.

The District Magistrate's Court in the Province of Quebec is not a court of record. (*q*)

The 32 & 33 Vic., c. 31, s. 65 *et seq.*, as amended by the 33 Vic., c. 27, 40 Vic., c. 27, and 42 Vic., c. 44, provides for appeals in cases of summary conviction.

The Con. Stats. U. C., c. 114, giving an appeal to the sessions, on conviction of a person in any matter cognizable by a justice of the peace, not being a crime, was repealed by the 38 Vic., c. 4, s. 12, and by the statute R. S. O., c. 74, appeals in matters within the jurisdiction of the Ontario Legislature are made to conform to the proceedings provided by the 32 & 33 Vic., c. 31, before mentioned.

The right of appeal under these statutes is given only to the defendant on conviction, not to the complainant on acquittal. (*r*)

An appeal is subject to the following conditions: If the conviction or order be made more than twelve days before the sittings of the court to which the appeal is given, such appeal shall be made to the then next sittings of such court; but if the conviction or order be made within twelve days of the sittings of such court, then to the second sittings next after such conviction or order. The person aggrieved shall give to the prosecutor or complainant, or to the convicting justice, or one of the convicting justices for him, a notice in writing of such appeal, within four days after such conviction or order, and the person appealing shall either remain in custody or give security, or in certain cases deposit money as security.

A notice of appeal for the next ensuing sittings, when the sittings are within twelve days of the conviction, is inoperative, and proper notice may afterwards be given, but of course within the four days; and this though on the first notice the

(*q*) *Provost v. Masson*, 5 *Revue Leg.* 557.

(*r*) *Re Murphy*, 8 U. C. P. R. 420.

defendant have obtained an order for costs from the session, under sec. 69 of the principal Act. (s)

The notice need not be signed by the appellant. (t)

The words within four days after conviction, exclude the day of conviction. (u)

An appeal lies to the sessions from a summary conviction, under the Inland Revenue Act, 31 Vic., c. 8, s. 130, for possessing distilling apparatus without having made a return thereof, such an offence being a crime. (v)

So an appeal lies from a conviction for penalties under the Dominion Fisheries Act, 1868, c. 60. (w)

Under "the Indian Act, 1876," 39 Vic., c. 13, s. 84 (D.), an appeal must be brought before the appellate judge within thirty days from the conviction. Giving notice of appeal to the next session, and entering a recognizance within that time, is not sufficient. (x)

The person appealing from a summary conviction by a justice, must show a compliance with all the conditions imposed upon him by the statute under which he appeals. He must not only give notice within the proper time, but he must also either remain in custody or enter into the proper recognizance. (y) Where, in the recognizance, the appellant, instead of being bound to appear and try the appeal, etc., as required by the Act, was bound to appear at the sessions to answer any charge that might be made against him, the appeal was dismissed. An application to take the appellant's recognizance in court was refused, on the ground that, although the recognizance need not be entered into within four days, it must be entered into and filed before the sittings of the Court of Quarter Sessions, to which the appeal is made. (z)

It was held, under the former statutes, that the form of

(s) *Reg. v. Caswell*, 33 U. C. Q. B. 303.

(t) *Reg. v. Nicol*, 40 U. C. Q. B. 76.

(u) *Scott v. Dickson*, 1 U. C. P. R. 366.

(v) *Re Lucas and McGlashan*, 29 U. C. Q. B. 81.

(w) *Reg. v. Todd*, 1 Russell & Chesley, 62.

(x) *Re Hunter*, 7 U. C. P. R. 86.

(y) *Kent v. Olds*, 7 U. C. L. J. 21; *Re Meyer*, 23 U. C. Q. B. 611.

(z) *Kent v. Olds*, *supra*.

recognizance to try an appeal, given in the schedule to the Con. Stats. Can., c. 103, p. 1130, was sufficient, though the condition differed in form from that provided for by c. 99, s. 117. (a)

Before an appeal can be entertained, it is clearly incumbent on the appellant to show his right to appeal, by proving compliance with the 33 Vic., c. 27, s. 1, sub. 3, by having remained in custody, or entered into a recognizance. This is a substantial, not a mere technical, objection to the appeal, and is not waived by the respondent asking for a postponement, after the appellant has proved his notice of appeal on the first day of the court. (b)

But when exception has been taken to the jurisdiction of the court, and the party objecting has afterwards proceeded to trial on the merits, he should be held to have waived proof of the preliminary conditions to give jurisdiction, where it appears that they have in fact been complied with. (c)

The production of the recognizance by the clerk of the court, and proof of service of the notice of appeal, are sufficient to found the jurisdiction of the court. (d)

The enrolment of the recognizance is unnecessary, and the filing the recognizance by the appellant, instead of its being transmitted to the clerk of the peace by the justice who took it, is not fatal. So the condition reading to appeal "to the General Quarter or General Sessions," and not "to the Court of General Sessions of the Peace," does not render it invalid. (e)

A notice of appeal following the form given in the Con. Stats. Can., c. 103, p. 1130, and stating "that the formal conviction drawn up and returned to the sessions is not sufficient to support the conviction, etc.," was held sufficiently particular to allow all objections being raised, which were apparent on the face of the conviction or order. (f)

(a) *Re Wilson*, 23 U. C. Q. B. 301.

(b) *Re Meyers*, 23 U. C. Q. B. 611.

(c) *Reg. v. Essery*, Rob. & Jos. Dig. p. 3485.

(d) *Ibid.*

(e) *Ibid.*

(f) *Helps and Eno*, 9 U. C. L. J. 302.

After notice of appeal has been given, and the time for hearing the appeal arrived, no amendment can be made to the conviction. (g)

The appeal should not be drawn up until the four days have elapsed. (h)

It appears to be the established practice for the sessions to hear appeals on the first day, but there is no law compelling them to do so. (i)

One D. M. having been on the 27th of August, 1862, convicted before justices of the peace, "for allowing card-playing at his inn, and other disorderly conduct during this year," was fined \$20 and costs. On judgment being pronounced, he remarked that he would pay the fine, etc., but he would "see further about it." On the 30th of August notice of appeal was given to the prosecutor and to one of the convicting justices, and on the 11th of September the appeal came on at the Quarter Sessions, when that court decided that the right to appeal was waived and lost by reason of the plaintiff having paid the fine and costs. The court above, however, under these facts held that there was no waiver of the right to appeal; that the statement of the defendant was capable of meaning that he meant to use any remedy that was by law open to him, whether by appeal or otherwise, and as the Act respecting appeals does not require notice of appeal to the convicting justice, nor provide for a stay of the levy, it might be reasonably inferred that he paid the fine and costs to prevent the distress and sale which might have taken place, although he had at the moment of conviction given the most formal notice of appeal. (j)

The court should rather lean to the hearing of appeals than to dismissing them on technical grounds. (k)

An appeal from a conviction for selling liquor without

(g) *Reg. v. Smith*, 35 U. C. Q. B. 518.

(h) *Reg. v. Hessel*, 44 U. C. Q. B. 51.

(i) *Re Meyers*, 23 U. C. Q. B. 614, per *Draper*, C. J.

(j) *Re Justices of York*, 13 U. C. C. P. 159.

(k) *Ibid.* 162, per *Draper*, C. J.; *Rex v. Justices of Norfolk*, 5 B. & A. 992.

license, contrary to the R. S. O., c. 181, must be tried by the judge of the county court in chambers, without a jury. (*l*) And the judge may quash the conviction without hearing it *de novo*, if bad on its face. (*m*)

It would appear that, under the present statutes, which it has been decided are within the competence of the Dominion Parliament to enact, (*n*) it is discretionary with the court to grant or refuse a jury at the request of either appellant or respondent; for the 36 Vic., c. 58, s. 2, has been held to be explanatory of sec. 66 of the 32 & 33 Vic., c. 31, in all cases. (*o*) But, if a jury be not so demanded, it seems it is imperative on the court to try the appeal, and they shall be the absolute judges, as well of the fact as of the law, in respect to the conviction or decision appealed from. (*p*)

The Court of Quarter Sessions, by the 33 Vic., c. 27, s. 1, subs. 3, and R. S. O., c. 74, s. 4, has power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another or others of the said court. An adjournment of the sessions is a continuance of the same sessions or sittings. (*q*)

An appeal, dismissed for want of prosecution, may, at the instance of the appellant, and on his satisfactorily accounting for his non-appearance, be reinstated. (*r*)

The 32 & 33 Vic., c. 31, s. 66, provided that no witnesses should be examined who were not examined before the justice on the hearing of the case, and this whether the appeal was tried by the court or a jury. But now the 43 Vic., c. 44, s. 10, and the R. S. O., c. 74, s. 4, provide that either of the parties to the appeal may call witnesses and adduce evidence, in addition to the witnesses called and evidence adduced at the original hearing. (*s*)

(*l*) See sec. 71; *Re Brown*, 8 C. L. J. N. S. 81.

(*m*) *Rose v. Burke*, 1 Russ. & Geld. 94.

(*n*) *Reg. v. Bradshaw*, 38 U. C. Q. B. 564.

(*o*) *Reg. v. Washington*, 46 U. C. Q. B. 221.

(*p*) See 32 & 33 Vic., c. 31, s. 66; see also 33 Vic., c. 27, s. 1, subs. 3.

(*q*) *Reg. v. Guardians of Cam. Union*, 7 U. C. L. J. 331; *Rawnsley v. Hutchinson*, L. R. 6 Q. B. 305.

(*r*) *Re Smith*, 10 U. C. L. J. 20.

(*s*) *Reg. v. Washington*, 46 U. C. Q. B. 221.

Where a rule *nisi*, for a *mandamus* to the sessions, commanding them to hear an appeal, called upon the Court of Quarter Sessions in and for the United Counties, etc., instead of the justices of the peace for the United Counties, and the rule had been enlarged in the prior term; on objection to the rule on the above ground, it was replied that the enlargement waived the objection, and this seems to have been acquiesced in by counsel and by the court. (t) In fact, it seems that in all cases formal and technical objections are waived by an enlargement. (u)

The appellant having been convicted of an assault under the Con. Stats. Can., c. 91, s. 37, appealed to the Quarter Sessions. On the first day of the court, after he had proved his notice of appeal, at the respondent's request the case was postponed until the following day, and the respondent then objected to the jurisdiction, as it was not shown that the appellant had either remained in custody or entered into a recognizance, as required by Con. Stats. Can., c. 99, s. 117. The court held that this objection was not waived by the application to postpone. (v)

Causes appealed to the sessions cannot afterwards be appealed to a superior court; nor can the latter court entertain such a case even to the extent of considering a point reserved by the sessions by consent. (w) And the right of appeal does not exist, even where the appeal to the sessions has gone off on a preliminary objection. (x)

For the purpose of preventing frivolous appeals, the 32 & 33 Vic., c. 31, s. 69, enables the Court of Sessions, on proof of the giving of notice of appeal, though such appeal was not afterwards prosecuted or entered, if it has not been abandoned according to law, to order the payment of reasonable costs, by the party giving the notice.

(t) *Re Justices of York*, 13 U. C. C. P. 159.

(u) *Reg. v. Allen*, 5 U. C. P. R. 453-8.

(v) *Re Meyers*, 23 U. C. Q. B. 611.

(w) *Cochran v. Lincoln*, 3 Russ. & Ches. 480; *Rose v. Burke*, 1 Russ. & Geld. 94; *Coolan v. McLean*, 3 Russ. & Ches. 479; 32 & 33 Vic., c. 31, s. 71.

(x) *Reg. v. Firman*, 6 U. C. P. R. 67.

There was nothing in the Con. Stats. U. C., c. 114, to authorize an order that a defendant, who had appealed and been acquitted by a jury upon his trial, should pay the costs of the appeal and trial, or any portion of them.

Where the Court of Quarter Sessions ordered a party to pay certain costs of an appeal, and they not being paid, an indictment was preferred for non-payment thereof, and on this indictment the defendant was found guilty; it was held that the indictment could not be supported, either at common law or under the statute. (*y*)

The court will not give costs, on adjourning an appeal, unless the objection is made at the time of the adjournment. (*z*)

Under the English Act, 20 & 21 Vic., c. 43, the court will not entertain an application for costs of an appeal against a decision of a justice, in the term after that in which the judgment is pronounced. (*a*)

It seems doubtful whether, under the 32 & 33 Vic., c. 31, s. 74, an order of sessions, simply ordering costs of an appeal to be paid, without directing them to be paid to the clerk of the peace, as required by the Act, is regular. (*b*)

The sessions have, it seems, no power to order a person acquitted on appeal to pay any part of the costs of such appeal. (*c*)

Where a rule for amendment is opposed, the costs must be paid by the successful party. (*d*)

Where one of the justices, before whom a person was convicted for breach of the license laws, stated that all the papers necessary to perfecting the appeal were filed, except the bond telling the party it was all right, the court allowed the appeal, though no affidavit had been filed. (*e*)

(*y*) *Reg. v. Orr*, 12 U. C. Q. B. 57.

(*z*) *Re McCumber*, 36 U. C. Q. B. 516.

(*a*) *Budenberg and Roberts*, L. R. 2 C. P. 292.

(*b*) *Re Delaney v. Macnab*, 21 U. C. C. P., 563.

(*c*) *Reg. v. Orr*, 12 U. C. Q. B. 57.

(*d*) *McKay v. McKay*, 2 Thomson, 75.

(*e*) *Ibid.*

In Nova Scotia, under the Rev. Stat., c. 95, an appeal under the River Fisheries Act must be made to the sessions. (*f*)

The 32 & 33 Vic., c. 30, s. 41, empowers the justice before whom the prisoner is charged with an indictable offence to remand, from time to time, for such period as may be reasonable, not exceeding eight clear days at any one time. Sec. 42 authorizes a verbal remand where the time does not exceed three clear days.

Where the remand is in open court to the proper officer there present, no written order or commitment is necessary. (*g*)

A remand for an unreasonable time would be void. (*h*) It seems doubtful whether a judge, sitting in chambers, has power, on an application of a prisoner for his discharge on a bad warrant, to remand him, (*i*) and in aid of the prosecution to order a *certiorari* to bring up the depositions; or whether the court or judge has power, upon reading such depositions, to amend a bad warrant of a coroner or issue a new one, for the purpose of detaining a prisoner in custody. (*j*)

On discharging a jury charged with a prisoner, because they are unable to agree, the court has power, and it is the duty of the judge, to remand the prisoner to gaol until delivered in due course of law, or to the next sessions of the court, fixing or not fixing the day, as the case may be. (*k*)

When prisoners are remanded to prison, after the disagreement of the jury on the trial, they are detained, not upon the indictment, which is only the accusation and charge found for their trial, but upon the original commitment for the offence originally charged. (*l*)

It would seem that the Con. Stats. U. C., c. 112, as to the reservation of points of law in criminal cases, only confers on the sessions authority to state a case for the opinion of the

(*f*) *Gough v. Morton*, 2 Thomson, 10.

(*g*) *Reg. v. Mulholland*, 4 Pugsley & B. 478.

(*h*) *Connors v. Darling*, 23 U. C. Q. B. 547-51, per *Hagarty*, J.

(*i*) *Re Carmichael*, 10 U. C. L. J. 325.

(*j*) *Ibid.*

(*k*) *Ex parte Blossom*, 10 L. C. J. 32, per *Mont*, J.

(*l*) *Ibid.* 41, per *Badgley*, J.

superior court, where the original hearing and conviction is at the sessions, and that, when a summary conviction is appealed to the sessions, there is no power to reserve a case on such appeal. (m)

The court has authority, in virtue of its inherent jurisdiction at common law, when a prisoner charged with felony is brought up on a *habeas corpus*, to look not merely at the commitment, but also at the depositions; and though the former be informal, yet if the latter show that a felony has been committed, and that there is a reasonable ground of charge against the prisoner, he will be remanded and not bailed, with a view to amending the warrant. (n)

It would seem that, where proceedings are taken by *habeas corpus* and *certiorari*, under the 29 & 30 Vic., c. 45, the evidence may also be looked at on the return to the *certiorari*. (o)

This statute had in view and recognizes the right of every man, committed on a criminal charge, to have the opinion of a judge of the Superior Court on the cause of his commitment by an inferior jurisdiction. The judges of the Superior Court are bound, when a prisoner is brought before them, under the statute, to examine the proceedings and evidence anterior to the warrant of commitment, and to discharge the prisoner if there does not appear sufficient cause for his detention. (p)

Before sec. 3 of this statute, there was no way of inquiring into the truth of the facts as stated in the return. Section 3 provides that, in all cases coming within the Act, although the return to any writ of *habeas corpus* shall be good and sufficient in law, it shall be lawful for the court, or for any judge before whom such writ may be returnable, to proceed to examine into the truth of the facts set forth in such return, by affidavit or by affirmation, where an affirmation is allowed by law.

(m) *Pomeroy and Wilson*, 26 U. C. Q. B. 45; see also *Yearke v. Bingleman*, 28 U. C. Q. B. 551.

(n) *Re Anderson*, 11 U. C. C. P. 56.

(o) *Reg. v. Levesque*, 30 U. C. Q. B. 509.

(p) *Reg. v. Mosier*, 4 U. C. P. R. 64.

As to the writ of *certiorari*, which is always issued along with the *habeas corpus* in order to bring up the depositions and papers, it may now, by the 29 & 30 Vic., c. 45, s. 5, be returned "to any judge in chambers, or to the court."

Before this Act, writs of *certiorari* had in practice issued in vacation, by order of a judge in chambers, but as the power to do so was questioned, the Act was passed to remove the doubt. (q)

The prisoner may contradict the return to the writ of *habeas corpus*, by showing that one of the persons who signed the warrant was not a legally qualified justice of the peace, and it would seem that he could do so even independent of the above statute. (r) But at all events, this section disposes of the point by empowering the judge to examine into the truth of the facts set forth in the return. (s)

No appeal lies from a conviction rendered by a judge of the Sessions of the Peace for the Province of Quebec. (t)

The 29 & 30 Vic., c. 45, was passed to extend the remedy by *habeas corpus*, and enforce obedience thereunto, and prevent delays in the execution thereof.

In doubtful cases, the court always inclines in favor of liberty. (u) It therefore is the duty of a judge hearing an application for discharge under a writ of *habeas corpus*, when a prisoner is restrained of his liberty under a statute, to discharge him, unless satisfied by unequivocal words that the imprisonment is warranted by the statute. (v) It is also the duty of the judge, when doubting the sufficiency of the warrant of commitment, to discharge the prisoner. (w) But the writ should not be used as a means of appealing from

(q) *Reg. v. Mosier*, 4 U. C. P. R. 70, per *J. Wilson*, J.

(r) *Bailey's case*, 3 E. & B. 614; *Reg. v. Boyle*, 4 U. C. P. R. 256.

(s) *Reg. v. Boyle*, 4 U. C. P. R. 256.

(t) *Ex parte Slark*, 7 L. C. J. 6.

(u) *Reg. v. Boyle*, 4 U. C. P. R. 264, per *Morrison*, J.

(v) *Re Slater*, 9 U. C. L. J. 21.

(w) *Re Beebe*, 3 U. C. P. R. 270.

other tribunals points more relating to practice than affecting the merits. (x)

It would seem that a judge in chambers has, at common law, power to issue writs of *habeas corpus* in cases not within the 31 Car. II., c. 2. (y) But it seems doubtful whether a judge in chambers has power to rescind his own order for a writ of *habeas corpus*, or to quash the writ itself, on the ground that it issued improvidently; or to call upon the prosecutor or justice to show cause why a writ of *habeas corpus* should not issue, instead of at once ordering the issue of the writ. (z)

A judge, sitting in *banc* during term in the Practice Court, has no authority under Con. Stats. U. C., c. 10, s. 9, to grant a rule *nisi* for a writ of *habeas corpus ad subjiciendum*; for until the rule is moved, there is no cause or business depending, in relation to the prisoner's conviction or commitment. Where such rule had been issued there, returnable in full court, it was discharged on this preliminary objection. (a)

The judges of the superior courts had power to direct the issue of writs of *habeas corpus ad subjiciendum*, in vacation, returnable either in term or vacation. (b)

The 29 & 30 Vic. c. 45, s. 1, confers full authority on any of the judges of either of the superior courts of law or equity in Ontario to award, in vacation time, a writ of *habeas corpus ad subjiciendum*, under the seal of the court wherein the application shall be made. Where writs of *habeas corpus* were made returnable forthwith, and the prisoners were brought into court on Tuesday, and the matter directed to be argued on the following Saturday, and the writs and returns, which had been filed the day the prisoners were brought in, were by order of a judge taken off the file again and returned

(x) *Cornwall v. Reg.*, 33 U. C. Q. B. 108.

(y) *Re McKinnon*, 2 U. C. L. J. N. S. 327, per A. Wilson, J.

(z) *Re Ross*, 3 U. C. P. R. 301.

(a) *Reg. v. Smith*, 24 U. C. Q. B. 480.

(b) *Re Hawkins*, 3 U. C. P. R. 239.

to the sheriff; it was held by a majority of the court that the court could direct the sheriff to bring in the bodies of the prisoners on the day set for argument, without directing new writs to issue. (c)

Where the proper remedy is by writ of error, a *habeas corpus* will not be granted. (d)

A writ of *habeas corpus* has been refused in the case of a person confined in gaol, under civil process, such as a *capias ad respondendum*. (e)

As the Imp. Stat. 56 Geo. III., c. 100, is not in force in this country, it was at least doubtful whether a judge, in chambers, had power to order the issue of a writ of *habeas corpus*, where the custody is not for criminal or supposed criminal matter. And where, upon the return of a writ of *habeas corpus*, it appeared that the prisoner was in custody under a writ of *capias*, issued out of a county court, and regular on its face, but which, it was contended, had been improperly issued on defective materials, a judge, sitting in chambers, refused to discharge the prisoner. (f) But provincial statutes have remedied this defect. (g)

The 29 & 30 Vic., c. 45, expressly excepts persons imprisoned for debt, or by process in any civil suit; and it would seem that the writ cannot now be obtained in the case of a person confined under a *capias ad respondendum* on civil process.

A *habeas corpus* will not be granted to bring up a prisoner under sentence of conviction at the sessions for larceny. (h)

A judge has no jurisdiction, on a writ of *habeas corpus*, to liberate a person found guilty of simple larceny and sentenced to be imprisoned in the penitentiary for life, although it may appear that the sentence is illegal. The judge to

(c) *Reg. v. Tower*, 4 Pugsley & B. 478.

(d) *Re McKinnon*, 2 U. C. L. J. N. S. 327.

(e) *Barber v. O'Hara*, 8 L. C. R. 216.

(f) *Re Bigger*, 10 U. C. L. J. 323; *Re Hawkins*, 9 U. C. L. J. 298, doubted; see, however, *Re Runciman v. Armstrong*, 2 U. C. L. J. N. S. 165.

(g) R. S. O., c. 70.

(h) *Reg. v. Crabbe*, 11 U. C. Q. B. 447.

whom an application for such writ is made, having no jurisdiction to reverse the sentence, must abstain from giving an opinion upon the legality or illegality of such sentence. (i) His proper course is by petition to the Crown.

In one case, where a person having been sent to the penitentiary upon a judgment which was afterwards reversed as having been pronounced upon two counts, one of which was defective, a *habeas corpus* was ordered to bring him up to receive the proper judgment. (j)

The mere fact of the warrant of commitment having been countersigned, under the 31 Vic., c. 16, s. 1, by the clerk of the Privy Council, does not withdraw the case from the jurisdiction of a judge on a *habeas corpus*. (k)

At common law a writ of *habeas corpus ad testificandum* may be issued to the warden of the Provincial Penitentiary, to bring a convict for life before a court of Oyer and Terminer and general gaol delivery, to give testimony, on behalf of the Crown, in a case of murder. The writ may be granted before the sittings of the court commence. (l)

Under the 4 & 5 Vic., c. 24, s. 11, a court of Oyer and Terminer could, while sitting, make an order to any gaol or prison out of the county where the court was sitting, to bring up a prisoner, in order to give evidence at the trial. But under this statute no order could be made until the opening of the court. (m)

Now the 32 & 33 Vic., c. 29, s. 60, provides that an order may be made on the warden of the penitentiary to deliver the prisoner to the person named in such order to receive him, and the latter shall convey the prisoner to the place of trial, to obey such further order as to the court may seem meet.

Where an offender, for whose arrest a magistrate's warrant is issued, lives in a county different from that where the

(i) *Ex parte Plante*, 6 L. C. R. 106.

(j) *Cornwall v. Reg.*, 33 U. C. Q. B. 106.

(k) *Reg. v. Boyle*, 4 U. C. P. R. 256.

(l) *Reg. v. Townsend*, 3 U. C. L. J. 184.

(m) *Ibid.*

warrant issued, and the warrant is backed to take him in the county where he resides, and it is there found that he is a prisoner for debt, in close custody, in such county, he may be removed under a writ of *habeas corpus ad subjiciendum*. (n)

A prisoner is not entitled to a *habeas corpus*, under the 31 Car. II., c. 2, unless there be a "request, in writing, by him, or any one on his behalf, attested and subscribed by two witnesses who were present at the delivery of the same." (o)

As a general rule, the affidavit on which an order for a writ of *habeas corpus* is moved should be made by the prisoner himself, or some reason, such as coercion, shown for his not making it; and it should be entitled in one or other of the superior courts. It is discretionary, however, with the judge to whom the application is made to receive an affidavit of a different kind, or one not sworn to by the prisoner himself. (p)

It has been held sufficient to return to a writ of *habeas corpus* a copy of the warrant under which the prisoner is detained, and not the original. (q) But the authority of this case has been doubted, and seems very questionable. It has been subsequently held that the person to whom a writ of *habeas corpus* is directed, commanding him to return "the cause of taking and detainer," must return the original, and not merely a copy of the warrant. (r) The sheriff, although he cannot return a warrant in *hæc verba*, must return the truth of the whole matter. (s)

Where a commitment is illegal on its face, the court will not wait till the committing magistrate has been notified to produce the papers, but will order a writ of *habeas corpus* to issue instant; (t) and where a prisoner is brought up upon such a writ, and the return shows a commitment bad upon

(n) *Reg. v. Phipps*, 4 U. C. L. J. 160.

(o) *Re Carmichael*, 1 U. C. L. J. N. S. 243.

(p) *Re Ross*, 3 U. C. P. R. 301; 10 U. C. L. J. 133.

(q) *Ibid.*

(r) *Re Carmichael*, 10 U. C. L. J. 323.

(s) *Reg. v. Mu'holland*, 4 Pugsley & B. 476.

(t) *Ex parte Messier*, 1 L. C. L. J. 71.

its face, the court will not, on the suggestion that the conviction is good, adjourn the case for the purpose of having the conviction brought up, and amending the commitment by it. (*u*)

Where a prisoner is, under a writ of *habeas corpus*, discharged from close custody, on the ground that the warrant of commitment charges no offence, he is not, under 31 Car. II., c. 2, s. 6, entitled to his discharge as against a subsequent warrant, correctly stating the offence, upon the alleged ground that the second is "for the same offence" as the first arrest. (*v*) But it has been held in Quebec, that where particular acts set forth in a warrant do not give cause of arrest, no new warrant for the same cause can issue, even where, in a subsequent case against another person, the courts have held that the grounds set out on such first warrant did disclose an offence. (*w*)

The court refused to discharge a prisoner brought up on *habeas corpus*, charged with having murdered his wife in Ireland; communication having been made by the Provincial to the Home Government on the subject, and no answer received, and the prisoner having been in custody less than a year. (*x*) The object of the 31 Vic., c. 16, was to suspend the operation of the writ of *habeas corpus*, and to deprive the subject restrained of his liberty. (*y*)

The county judge, sitting under 32 & 33 Vic., c. 35, as amended by the 42 Vic., c. 44, has the same authority and jurisdiction as the Court of Sessions, (*z*) and his court is a court of record, and there is therefore no right to a writ of *habeas corpus*. (*a*)

Although justices of the peace, exercising summary jurisdiction, are the sole judges of the weight of evidence given before them, and no other of the Queen's courts will examine

(*u*) *Re Timson*, L. R. 5 Ex. 257.

(*v*) *Re Carmichael*, 1 U. C. L. J. N. S. 243.

(*w*) *Ex parte Dewernay*, and *ex parte Cotte*, 19 L. C. J. 248.

(*x*) *Rex v. Fitzgerald*, 3 U. C. Q. B. O. S. 300.

(*y*) *Re Boyle*, 4 U. C. P. R. 261, per *Morrison*, J.

(*z*) *Reg. v. Haines*, 42 U. C. Q. B. 208; see also *Reg. v. Piché*, 39 U. C. C. P. 409; *Reg. v. St. Denis*, 8 U. C. P. R. 16.

(*a*) *Reg. v. St. Denis*, *supra*.

whether they have formed the right conclusion from it or not; yet other courts may and ought to examine whether the premises stated by the justices are such as will warrant their conclusion in point of law. (b)

When a matter is within the jurisdiction of justices, and their proceedings are regular and according to law, the court will not interfere with their decision, though it should be wrong or unjust, but the court will inquire whether the case was within their jurisdiction or not. Thus, where the nature of the charge is doubtful, and in the course of the inquiry it turns out that the case is not one over which they have jurisdiction, the superior court may, on *habeas corpus*, examine the evidence and entertain the question of jurisdiction. (c)

Where justices have to decide a collateral matter, before they have jurisdiction, and they give themselves jurisdiction by finding facts which they are not warranted in finding, the court will review their decision, and if they have, improperly given themselves jurisdiction, will set aside the proceedings; but, where the question is a material element in the consideration of the matter they have to determine and they, exercising their judgment as judges of the fact, have decided it on a conflict of evidence, it is contrary to principle and practice to interfere; (d) even though they may think that, upon the evidence, the justices have come to a wrong conclusion.

Thus where a charge was preferred to a court of Quarter Sessions, under 1 Wm. & M., c. 21, s. 6, against a clerk of the peace, for a misdemeanor in his office, and evidence was taken, and the court decided that the charges were proved, and dismissed the clerk of the peace from his office, and appointed another person in his place; it was held on a *quo warranto* information against the person so appointed, that the sufficiency of the evidence was a question entirely for the

(b) *The Scotia* S. V. A. R. 160.

(c) *Re McKinnon*, 2 U. C. L. J. N. S. 327-8, per A. Wilson, J.

(d) *Ex parte Vaughan*, L. R. 2 Q. B. 116, per Cockburn, C. J.

court of Quarter Sessions, and the decision of that court could not be reviewed by the Court of Queen's Bench. (e)

Except when applied for on behalf of the Crown, a *certiorari* is not a writ of course; (f) and is only applicable to judicial as distinguished from ministerial acts. (g)

The granting or refusing of the writ rests in the discretion of the court; and where the proceedings sought to be removed were completely spent, and no benefit would arise from re-opening them, the order was refused. (h) There is no right of revision of judgment on an application for this writ; (i) and a motion having been made for a *certiorari* and refused, the court declined to hear a second application. (j)

The court must be satisfied on affidavits that there is sufficient ground for issuing it; and it must in every case be a question for the court to decide whether, in fact, sufficient grounds do exist. (k) And it seems doubtful whether the applicant should not produce a copy of the proceedings before the justice, or account for not doing so, (l) and their substance should in all cases be before the court. (m)

Where a man is chosen into an office or place, by virtue whereof he has a lawful right, and is deprived thereof by an inferior jurisdiction, who proceed in a summary way, in such case he is entitled to a *certiorari, ex debito justitiæ*, because he has no other remedy, being bound by the judgment of the inferior jurisdiction. (n)

In other cases, where the application is by the party grieved, so as to answer the same purpose as a writ of error, it might be treated like a writ of error, as *ex debito justitiæ*; but where the applicant is not a party grieved, who substan-

(e) *Reg. v. Russell*, 5 U. C. L. J. N. S. 129; 17 W. R. 402.

(f) *Reg. v. Justices of Surrey*, L. R. 5 Q. B. 466.

(g) *Reg. v. Simpson*, 4 Pugsley & B. 472.

(h) *Reg. v. Lord Newborough*, L. R. 4 Q. B. 585.

(i) *Ex parte Spelman*, 10 L. C. J. 81; but see *contra ex parte Beauparlant*, 10 L. C. J. 102.

(j) *Ex parte Abel*, 2 Pugsley & B. 2.

(k) *Reg. v. Gzowski*, 14 U. C. Q. B. 591.

(l) *Ex parte Abel*, 2 Pugsley & B. 600.

(m) *Ex Parte Nevers*, 1 Pugsley & B. 5.

(n) See *Reg. v. South Holland*, D. C. 8 A. & E. 429.

tially brings error to redress his private wrong, but comes forward as one of the general public, having no particular interest in the matter; and if the court thinks that no good would be done to the public, it is not bound to grant it at the instance of such a person. (o)

Certiorari may be granted to remove proceedings which are void. (p)

When a statute gives an appeal, this does not take away the right to a *certiorari*. The right can only be taken away by express words; and, for this reason, the power given to a judge of sessions to hear appeals from summary convictions before justices of the peace does not take away the right of this court to grant a writ of *certiorari* to remove such conviction. (q) Nor does the fact that the petitioner has a remedy by trespass affect his right. (r)

Where a defendant has been committed for trial, but afterwards admitted to bail and discharged from custody, a superior court of law has still power to remove the proceedings on *certiorari*, but in its discretion will not do so where there is no reason to apprehend that he will not be fairly tried. (s)

A writ of *certiorari* may be granted, though expressly taken away by statute, (t) where there is ground for the belief that the conviction was had without proof; (u) and generally where there is a plain excess of jurisdiction. (v) So it lies where the conviction, on its face, is defective in substance; (w) as, for instance, omitting to state the reasons on which it is

(o) *Reg. v. Justices of Surrey*, L. R. 5 Q. B. 472-3.

(p) *Reg. v. Simpson*, 4 Pugsley & B. 472.

(q) *Ex parte Montgomery*, 3 Allen, 149; see also *Rex v. Gingras*, S. L. C. A. 560; but see *ex parte Richards*, 2 Pug. 6; *ex parte Nowlin*, Stev. Dig. 286; *ex parte Wilson*, 1 Pugsley & B. 274.

(r) *Ex parte Thompson*, 2 Q. L. R. 115.

(s) *Reg. v. Adams*, 8 U. C. P. R. 462.

(t) *Reg. v. Hoggard*, 30 U. C. Q. B. 156, per *Richards*, C. J.; *Barnaby v. Gardiner*, 1 James, 306.

(u) *Ex parte Morrison*, 13 L. C. J. 295; *ex parte Church*, 14 L. C. R. 318; see also *ex parte Lalonde*, 15 L. C. J. 251.

(v) *Hespeler and Shaw*, 16 U. C. Q. B. 104; *ex parte Matthews*, 1 Q. L. B. 353.

(w) *Re Watts*, 5 U. C. P. R. 267.

based. (x) And a *prima facie* case, showing want or excess of jurisdiction, or that the court was illegally convened or irregularly constituted, will be sufficient to obtain the writ. (y)

But it seems in such cases, that on the return the court cannot quash the conviction, but can only discharge the prisoner; and this even though there be no motion to quash the *certiorari*. (z) Still, the conviction being before the court, it might have power to quash it. (a)

There can be no *certiorari* after judgment, and the only course then is a writ of error. (b) Nor can an indictment be removed by *certiorari* from the court of General Sessions to the Queen's Bench, after verdict and before judgment, even by the consent of parties, for their consent will not authorize an unprecedented course in a criminal case. (c)

Where a conviction was made, under the Con. Stats. U. C., c. 75, and, on appeal to the sessions, the appeal was adjourned to another sessions, when the conviction was quashed, it was held that a *certiorari* might issue to remove the order quashing the conviction. (d)

Where the conviction is already in the possession of the superior court, no *certiorari* is necessary. (e)

The court will not grant a *certiorari* to examine the finding of a jury or justice of the peace on the facts, but to determine whether inferior tribunals exceeded their jurisdiction in convicting for an offence, which was not within the statute. (f) A *certiorari* will lie to bring the record and proceedings of a court martial before the superior court. (g)

(x) *Ex parte Lalonde*, 3 *Revue Leg.* 450; and see *ex parte Tremblay*, 15 L. C. J. 251.

(y) *Ex parte Thompson*, 2 Q. L. R. 115.

(z) *Reg. v. Johnson*, 30 U. C. Q. B. 423; *Reg. v. Leveque*, 30 U. C. Q. B. 509; and see *Reg. v. McAllen*, 45 U. C. Q. B. 402.

(a) *Ibid.*

(b) *Reg. v. Crabbe*, 11 U. C. Q. B. 447; *Reg. v. Smith*, 10 U. C. Q. B. 99.

(c) *Reg. v. Lafferty*, 9 U. C. Q. B. 306.

(d) *Re Doyle*, 4 U. C. P. R. 32.

(e) *Reg. v. Brydges*, 18 L. C. J. 94.

(f) *Hespeler and Shaw*, 16 U. C. Q. B. 104; *ex parte Lanier*, 6 *Revue Leg.* 350; *Rex v. Gingras*, S. L. C. A. 580; *Lord v. Turner*, 2 *Hannay*, 13. *Ex parte Thompson*, *supra*.

But a party imprisoned for contempt of the Court of Sessions cannot have his conviction removed by *certiorari*. (*h*)

In a prosecution, under the Act 5 Wm. IV., c. 2, for non-performance of statute labor, it must be proved that the party has been notified by the overseer of the time and place of meeting to perform the work, and where the affidavits, in answer to an application for a *certiorari* to remove the proceedings in such a prosecution, stated that the party had been duly notified, the court made the rule absolute, in order to ascertain what the notice really was, the appellant having in his affidavit denied notice. (*i*)

Mere irregularities in the proceedings of the inferior court are not sufficient to justify the granting of a writ of *certiorari*; but there must be proof that actual injustice has been done. (*j*) Where a defendant applies for a *certiorari* to remove an indictment, he must show that it is probable the case will not be fairly or satisfactorily tried in the court below, and if difficulties in point of law form the ground of the application, they must be specifically stated, and no mere general statement will suffice. (*k*)

Where the defendant, having been convicted on the information of a toll-gate keeper of evading toll, appealed to the sessions, where he was tried before a jury and acquitted, this court refused a writ of *certiorari* to remove the proceedings, the effect of which would be to put him a second time on trial. (*l*) It would seem that after an acquittal at the sessions, the writ cannot be granted; at all events, at the instance of a private prosecutor. (*m*) A conviction under the Con. Stats. L. C., c. 6, by a judge of the sessions of the peace cannot be brought up before the superior court by *certiorari*. (*n*)

(*h*) *Ex parte Vallieres de St. Real*, S. L. C. A. 593.

(*i*) *Ex parte Ferguson*, 1 Allen, 663.

(*j*) *Ex parte Gauthier*, 3 L. C. R. 498.

(*k*) *Re Kellett*, 2 U. C. P. R. 102; *Reg. v. Jowle*, 5 A. & E. 539; *Reg. v. Josephs*, 8 Dowl. P. C. 128.

(*l*) *Re Stewart*, 2 L. C. G. 23.

(*m*) *Ibid.*; see *Reg. v. Lafferty*, 9 U. C. Q. B. 306.

(*n*) *Ex parte Vaillancourt*, 16 L. C. R. 227.

Two persons were convicted of selling intoxicating liquors without license, in a township where the sale of intoxicating liquors, and the issue of licenses authorizing the sale, were prohibited under the Temperance Act of 1864, 27 & 28 Vic., c. 18. A memorandum of the conviction, simply stating it to have been a conviction for selling liquor without a license, was given by the justices to the accused. An application for a writ of *certiorari* to remove the conviction was refused, for it would seem, although the issue of a license was prohibited by a by-law, it was still an offence under (Ont.) 32 Vic., c. 32, to sell liquor without a license, and even if the conviction had been under the Temperance Act of 1864, and not under (Ont.) 32 Vic., c. 32, it was amendable under 29 & 30 Vic., c. 50; (o) and under the Canada Temperance Act, 1878, 41 Vic., c. 16, the right to a *certiorari* is taken away in all cases in which the magistrate has jurisdiction. (p)

Where a judgment has been pronounced in open court, and afterwards changed in such a manner as to increase the amount which the defendant was ordered to pay, the judgment will be set aside on *certiorari*. (q) And where it is shown that there is reasonable doubt as to the legality of the conviction, a judge will order a *certiorari*, even though it has been confirmed by the sessions on appeal. (r)

A conviction by a stipendiary magistrate of the city of Halifax, under sec. 140 of the City Charter, is receivable on *certiorari*. (s)

So, a *certiorari* lies to remove orders of sessions relating to the expenditure of the district rates and assessments at the instance of the Attorney General without notice. (t)

Where the magistrate before whom the conviction is had

(o) *Re Watts*, 5 U. C. P. R. 247.

(p) *Ex parte Orr*, 4 Pugsley & B. 67.

(q) *Ex parte MacFarlane*, 16 L. C. J. 221.

(r) *Re Sullivan*, 8 U. C. L. J. 276; but see *ex parte Richards*, 2 Png. 6.

(s) *Reg. v. Levy*, 3 Russ. & Chea. 51.

(t) *Reg. v. Justices of Newcastle*, Draper, 121.

refuses to certify the proceedings for appeal, the court will grant a *certiorari*. (u)

In the case of a conviction for an offence not being a crime, such as a breach of a by-law, (v) affirmed on appeal to the sessions, the writ of *certiorari* is not taken away by the (Ont.) 38 Vic., c. 4. (w)

In Quebec no *certiorari* can issue to quash a conviction under the License Act of that province, until the deposit required by law has been made. (x)

Proceedings had under the 31 Vic., c. 42, s. 18, are of such a character as to be susceptible of being removed by *certiorari*. (a)

The Superior Court of Montreal has no jurisdiction to grant a writ of *certiorari*, to bring up a conviction had before a justice of the peace, in the district of Three Rivers. (b)

A conviction before the police magistrate of St. John for breach of the by-laws of the corporation, cannot be removed by *certiorari*. (c) Nor can a conviction by a district magistrate of Quebec, under the License Act of that province, even where the defendant has made the required deposit. (d)

Orders or judgments which are not of a final character do not give rise to *certiorari*. (e)

Before a justice can convict a defendant not appearing, the service of the summons should be proved in open court, and an affidavit sworn before a commissioner is not sufficient. (f) And the mode in which such service is proved, and how and when it was effected, should be entered by the clerk in his book, and a mere entry of the fact of service is not enough; (g)

(u) *Ex parte Eastabrook*, 1 Pugsley & B. 283.

(v) *Reg. v. Washington*, 46 U. C. Q. B. 221.

(w) *Re Bates*, 40 U. C. Q. B. 284.

(x) *Ex parte Doray*, 6 *Revue Leg.* 507.

(a) *Ex parte Morrison*, 13 L. C. J. 295.

(b) *Ex parte Cumming*, 3 L. C. R. 110.

(c) *Ex parte Harley*, 5 Allen, 264.

(d) *Ex parte Duncan*, 16 L. C. J. 188.

(e) *Ex parte The Fabrique of Montreal*, 4 *Revue Leg.* 271.

(f) *Reg. v. Golding*, 2 Pug. 385.

(g) *Ibid.*

and where these requirements are neglected, the conviction will be quashed on *certiorari*. (h)

A *certiorari* only substitutes the superior court for the court below, and, whatever ought to have been done by the inferior tribunal had the case remained there, it must be the duty of the superior court to do when the case is removed. (i) And the conviction is there for all purposes, and a party may move to quash it, however and at whosoever instance brought up. (j)

An application for a *certiorari* should be made at the first term after the conviction, but where the justice had no jurisdiction in the matter, a *certiorari* was granted though a term had elapsed. (k) And special circumstances, as the fact that papers transmitted to counsel have miscarried, will induce the court to entertain an application after the first term. (l) Where an appeal from a summary conviction was made to a judge of the superior court under the (N. B.) 1 Rev. Stat., c. 161, s. 32, by which an appeal from a summary conviction was required to be made in the same manner as from a judgment in a civil suit, (m) and dismissed by him, it was held that a subsequent application for a *certiorari* should, in general, be made at the first term afterwards. The court refused to interfere in such a case, after the lapse of one term, where the conviction appeared to be sufficient on the merits; (n) or where, on proceedings for not altering a public road, the road had been opened in the meantime. (o) An application for a *certiorari* to remove proceedings under the Highway Act, 13 Vic., c. 4 (N. B.), though no time was limited by law, should be made without unreasonable delay. But a delay of one term was held not unreasonable. (p)

(h) *Reg. v. Golding*, 2 Pug. 385.

(i) *Reg. v. Wightman*, 29 U. C. Q. B. 214, per *Morrison*, J.

(j) *Reg. v. Wehlen*, 45 U. C. Q. B. 399.

(k) *Ex parte Mulhern*, 4 Allen, 259.

(l) *Reg. v. Golding*, 2 Pug. 385.

(m) See c. 137, s. 44.

(n) *Ex parte O'Regan*, 3 Allen, 261.

(o) *Rex v. Heaviside*, Stev. Dig. 286.

(p) *Ex parte Herbert*, 3 Allen, 108.

By the 13 Geo. II., c. 18, s. 5, the writ must be sued out within six calendar months next after the making of the conviction, judgment or order sought to be removed. And the fact that the notice has been served within that time does not save a writ issued after the expiration of the six months. (q) This provision does not bind the Crown. (r)

A writ of *certiorari* allowed before the expiration of six months from the day of the conviction, but not sued out until after the expiry of the six months, will be quashed. (s) And delay in taking out the writ has always been held to amount to a forfeiture of it. (t)

A *certiorari* not prosecuted during six months will be dismissed on motion. (u)

The statute further enacts that no writ of *certiorari* shall thenceforth be granted, issued forth, or allowed, to remove any conviction, order, etc., made by or before any justice or justices of the peace, or the General Quarter Sessions, unless it be duly proved upon oath that the party suing out the same hath given six days' notice thereof, in writing, to the justice or justices, or any two of them, if so many there be, by and before whom such conviction, etc., shall be so made, to the end that such justice, or the parties therein concerned, may show cause against the issuing or granting of the said *certiorari*.

A party was convicted of assault before three justices, and sentenced to pay a fine and costs. He appealed to the sessions, and the conviction was affirmed. He then obtained a *certiorari*, addressed to the chairman of the sessions, to remove the conviction affirmed by the sessions. The caption of the order made by the sessions, affirming the conviction of the defendant, stated it to have been by the chairman, and J. K. and W. G., justices. On the *ex parte*

(q) *Ex parte Palmer*, 16 L. C. J. 253.

(r) *Rex v. Justices of Newcastle*, Draper, 121.

(s) *Rex v. Chillas*, Rob. Dig. 74; 2 *Revue Leg.* 52; and see *ex parte Fiset*, 3 Q. L. R. 102.

(t) *Ex parte Hough*, 5 Q. L. R. 314.

(u) *Ex parte Boyer*, 2 L. C. J. 188-9; *ex parte Prefontaine*, *ibid.* 202.

application for the *certiorari*, the only notices, filed by the defendant, were notices served on the three convicting justices. No notice was served on the chairman of the sessions, or any two of his associates. It was held, on a rule to quash the *certiorari*, that the notice required by the statute should have been given to the chairman of the sessions and his associates, or any two of them, as required by the statute, and the *certiorari*, being obtained without such notice, was set aside. (v)

But where a conviction was made by a magistrate within twelve days of the sitting of the court, for which notice of appeal was given, which was therefore inoperative, and the sessions neither acted on nor confirmed the conviction, and the same still remained in the custody of the convicting magistrate, to whom the *certiorari* was directed, it was held that notice to the chairman of the sessions, of the defendant's intention to move for such writ, was not required. (w)

The notice should be given to the justices actually present, when the order of sessions is made. It has been held that, where a rule *nisi* for a *certiorari* has been first taken out and served on the justices, and a rule absolute obtained for issuing the writ, such a proceeding is not notice to the justices, and, in such a case, the court has quashed the *certiorari* upon motion to do so. (x)

Notice of application for a writ of *certiorari* must be given to the convicting justice, and the want of such notice is good cause to be shown to a rule *nisi* to quash the conviction. (y) And it has been doubted whether the writ was properly issued without such notice, though the object was to obtain the discharge of the prisoner, not to quash the conviction. (z)

In the *Ellis' case*, notice was given to the convicting

(v) *Reg. v. Ellis*, 25 U. C. Q. B. 324 ; 2 U. C. L. J. N. S. 184.

(w) *Reg. v. Caswell*, 33 U. C. Q. B. 303.

(x) *Reg. v. Ellis*, *supra*, 326, per *Morrison*, J.; *Rex v. Nichols*, 5 T. R. 281 n.; *Rex v. Rattislaw*, 5 Dowl. P. C. 539.

(y) *Reg. v. Peterman*, 23 U. C. Q. B. 516.

(z) *Reg. v. Munro*, 24 U. C. Q. B. 44.

justices but not to the chairman of the sessions or to his associates; and in the *Peterman* case, notice was given to the chairman of the sessions but not to the convicting justice. It would seem, therefore, that notice to both parties is necessary. In a notice, under the statute, of application for a *certiorari* to remove a conviction, the grounds of objection to such conviction need not be stated. (a)

Where, on application for a *certiorari*, made on notice to the justices, the rule was refused, such notice cannot inure to the benefit of a subsequent *ex parte* application on the same material. (b)

No notice is necessary where the conviction is already in the possession of the court, (c) or when the application is made by the private prosecutor and not by the defendant; and the writ in such case issues of course, and without assigning any grounds. (d)

The cases before referred to (e) apply only when the writ is obtained by the defendant with the view of quashing the conviction. (f)

An application to a judge in chambers for a *certiorari*, should be by a summons or rule *nisi*, in the first instance. (g)

Where a rule *nisi* for a *certiorari* is discharged because the affidavits are improperly entitled, the application may be renewed on amended affidavits. (h)

The affidavit of service of notice of motion for the *certiorari* must identify the magistrate served as the convicting magistrate. But an affidavit, defective in this respect, was allowed to be amended, the time for moving the *certiorari* not having expired. Acceptance of service, and an under-

(a) *Re Taylor v. Davy*, 1 U. C. P. R. 346.

(b) *Reg. v. McAllan*, 45 U. C. Q. B. 402.

(c) *Reg. v. Wehlen*, 45 U. C. Q. B. 399.

(d) *Reg. v. Murray*, 27 U. C. Q. B. 134.

(e) *Reg. v. Ellis*, 25 U. C. Q. B. 324; *Reg. v. Peterman*, 23 U. C. Q. B.

(f) *Reg. v. Murray*, *supra*.

(g) *Ex parte Howell*, 1 Allen, 584.

(h) *Ex parte Bustin*, 2 Allen, 211.

taking to show cause by an attorney for the magistrate, does not waive this objection. (i)

But an application was refused where three former applications had failed, two in consequence of a defect in the jurat of the affidavit, and one in consequence of the rule having been improperly granted by a judge at chambers. (j)

Where an order *nisi* for a *certiorari* had been served only four days before the first day of the term at which it was returnable, the court refused to make the rule absolute, and enlarged it till next term. (k) And where a rule was served only the day before the term, the court refused to enlarge it, (l) By the practice of the courts of New Brunswick, a *certiorari* is returnable, unless otherwise ordered, at the term next after that in which the rule for it is granted; and if not issued and served before such term, it is too late. (m)

Where the Christian name of the appellant was misstated in the writ, it was quashed, and a new writ ordered to issue. (n)

After the return of a *certiorari*, affidavits may be used to show want of jurisdiction in the justice, when the fact does not appear in the return. (o) But affidavits on which the writ is obtained cannot be used to contradict the return. (p)

Where a *certiorari* is applied for, to remove a conviction with a view to quashing it, before the return to the writ is filed, affidavits and rules should not be entitled in the cause, for, until the return is filed, there is no cause in court. So as soon as the return to the *certiorari* has been filed, the cause is in court, and the motion paper and rule *nisi* must be entitled in the cause. Where the rule was not so entitled it was discharged, but, being on a technical objection, without costs, and, under the circumstances of the case, an amendment was not allowed. (q)

(i) *Re Lake*, 42 U. C. Q. B. 206.

(j) *Ex parte Irvine*, 2 Allen, 519.

(k) *Ex parte Lyons*, 6 Allen, 409.

(l) *Reg. v. Harshman*, Stev. Dig. 823.

(m) *Ibid.* 293.

(n) *Reg. v. Walters*, 6 Allen, 409.

(o) *Reg. v. Simmons*, 1 Pugsley, 158.

(p) *Reg. v. Harshman*, Stev. Dig. 293.

(q) *Reg. v. Morston*, 27 U. C. Q. B. 132.

Where a rule *nisi* was obtained, to show cause why a *certiorari* should not issue to quash a conviction, it was held that the rule was properly entitled "In the matter of T. B.," and that it need not state into which court the conviction was to be removed, for this was sufficiently shown by entitling it in the court in which the motion was made. After the rule *nisi* for the *certiorari* is made absolute, affidavits, etc., should be entitled "The Queen against A. B.," etc., but, before, they are properly entitled "In the matter of A. B." (r)

On applications to quash convictions, the convicting justice must be a party to the rule. (s)

The writ of *certiorari*, issuing under the provisions of the 12 Vic., c. 41, must be addressed to the justice of the peace making the conviction, and not to the bailiff effecting the service of such writ, and such writ of *certiorari* addressed to the bailiff is a nullity, and will be superseded. (t) So a writ of *certiorari*, addressed to the superintendent of police, and which ought to have been addressed to the judge of the Sessions of the Peace, according to the provisions of the 25 Vic., c. 13, s. 1, will be set aside. Another writ will not be awarded, on motion to rectify the error in the address of the first writ. (u)

It is improper to call on the Court of General Sessions to show cause to a rule for a *certiorari*. (v)

In the Province of Quebec the writ should be addressed to the judge, not to the prothonotary of the court, and a writ issued contrary to this rule will be quashed. (w) So will a writ addressed to the superintendent of police, when it ought to have been directed to the judge of Quarter Sessions ; and on motion to rectify the error, a rule will be refused. (x)

But an objection, on motion to quash a conviction, that the *certiorari* was improperly directed to and returned by the

(r) *Re Barrett*, 28 U. C. Q. B. 559.

(s) *Reg. v. Law*, 27 U. C. Q. B. 260.

(t) *Reg. v. Barbeau*, 1 L. C. R. 320.

(u) *Piton v. Lemoine*, 16 L. C. R. 316.

(v) *Re Nash*, 33 U. C. Q. B. 181.

(w) *Grant v. Lockhead*, 16 L. C. R. 308 ; 10 L. C. J. 183.

(x) *Piton v. Lemoine*, 16 L. C. R. 316.

clerk of the peace and county attorney instead of to the county judge or magistrate; was overruled. (y)

Under the 12 Vic., c. 41, the original writ, and not a copy, must be served on the convicting justice ; but it is not necessary to serve a copy of the writ upon the complainant. (z)

A writ of *certiorari* will be quashed where a copy only of the writ has been served on the convicting justice, and his return made thereon. (a)

Where a conviction has been brought up by *habeas corpus* and *certiorari*, under the 29 & 30 Vic., c. 45, when, by the provisions of the 32 & 33 Vic., c. 31, no such writ could issue, it was held that it could not be quashed, but the court could only discharge the defendant. (b)

The conviction being in court, however brought up, the court might be obliged to consider it as upon a *certiorari*, issued at the common law, so long as it was regularly in court. (c)

The 71st section of the 32 & 33 Vic., c. 21, as amended by the 33 Vic., c. 27, does not prevent the removal of the conviction by *certiorari*. (d)

The defendant cannot, by motion, compel a petitioner for *certiorari* to proceed upon such writ, but the proper course for the defendant is to issue a *procedendo*. (e)

A judgment of the superior court, rendered on a writ of *certiorari*, is a final judgment, (f) and, under the circumstances in this case, it was held that no appeal lay from such judgment to the Court of Queen's Bench, as constituted in Quebec. (g) It seems that no appeal will lie from a judgment rendered on a writ of *certiorari*. (h)

(y) *Reg. v. Frawley*, 45 U. C. Q. B. 227.

(z) *Ex parte Filiau*, 4 L. C. R. 129.

(a) *Ex parte Lahayes*, 6 L. C. R. 486.

(b) *Reg. v. Levecque*, 30 U. C. Q. B. 509.

(c) *Ibid.* 513, per Wilson, J.; *Reg. v. Hellier*, 17 Q. B. 229; *Reg. v. Hyde*, 16 Jur. 337.

(d) *Reg. v. Levecque*, *supra*, 512, per Wilson, J.

(e) *Ex parte Morisset*, 2 L. C. R. 302; *Reg. v. Carrier*, *ibid.*

(f) *Boston and Lelievre*, 14 L. C. R. 457.

(g) *Ibid.*

(h) *Bazin and Orevier*, Rob. Dig. 28.

The return of the notice of motion for a writ of *certiorari* may be made by a bailiff; but if under his oath of office, it is insufficient. Such return must be proved upon oath, as required by the 13 Geo. II., c. 18, s. 5. (i)

A return from the justices should be before the court. (j)

And where none had been made by the justices to a *certiorari* directed to them, the court held the objection fatal, and refused to give judgment on the merits. (k)

Where a magistrate on a summary trial takes no written depositions, but the conviction returned to a *certiorari* sets out the evidence, the return must be taken *prima facie* to give a full and true statement. (l)

Parties failing to make a proper return, and within the proper time, will be mulcted in costs. (m)

A justice has no right to refuse to make a return to a writ of *certiorari* because the fees due in such case have not been paid, but a rule *nisi* for an attachment will not be issued *de plano* without previous notice to the justice. (n)

A motion to compel a justice to return the original papers, under a writ of *certiorari*, will be granted without costs against the justice. (o) But, in one case, such motion was granted with costs. (p)

The justices will be ordered to amend their return in a proper case. And where a return stated that the order was not in their possession, they were permitted to amend it by stating the substance of the order, and if they could not do this, then how the original order went out of their possession. (q) And where it appears on affidavit that the convic-

(i) *Ex parte Adams*, 10 L. C. J. 176, overruling *ex parte Roy*, 7 L. C. J. 109.

(j) *Lord v. Turner*, 2 Hannay, 13.

(k) *Mosher v. Doran*, 3 Russ. & Ches. 184; *Town of Pictou v. McDonald*, *ibid.* 334.

(l) *Reg. v. Flannigan*, 32 U. C. Q. B. 593; *ex parte Morrison*, 13 L. C. J. 295.

(m) *Ex parte Leroux*, 10 L. C. J. 193.

(n) *Ex parte Davies*, 3 L. C. R. 60.

(o) *Ex parte Demers*, 7 L. C. R. 428.

(p) *Ex parte Terrien*, 7 L. C. R. 429.

(q) *Reg. v. Vail*, 5 Allen, 165.

tion returned does not truly set forth the evidence given at the summary trial, they will be ordered to make a proper return or amend their conviction. (r)

But the evidence can be amended only with the concurrence of the witness, if he have signed the deposition ; and it is only by an amendment of the return that such evidence can be received, nor can it be supplied by affidavits. (s) But affidavits may be used as before stated to point out the discrepancy and found an order for amendment.

Where a *certiorari* simply requires a return of the evidence, the justice need not return the conviction, or a copy of it. (t) If the justice should have returned the conviction but had not done so, he would be allowed an opportunity to do so, and amend his return. If he had already returned the conviction to the clerk of the peace, he might show that fact, or he might transmit a copy of it instead, stating why he could not return the original. (u) If the justice did not truly return the proceedings, he would be liable for making a false return. (v) A return of affidavit and warrant only is insufficient (w)

A party appearing to support a conviction cannot object to the cause being proceeded with, because the justice's return to the *certiorari* is not under seal. (x)

In a case where, owing to a mistake in the Crown Office, a rule to return a writ of *certiorari*, and afterwards a rule for an attachment issued, although a return had, in fact, been filed—more than six months having thus expired since the conviction—the court was asked to allow process to issue against the justice for the illegal conviction, as of a previous term, but the application was refused. (y)

(r) *Reg. v. Flannigan*, 32 U. C. Q. B. 593 ; but see *ex parte Morrison*, 13 L. C. J. 295.

(s) *Reg. v. McNaney*, 7 C. L. J. N. S. 325-6, per *Wilson*, J.; 5 U.C.P.R. 438.

(t) *Ibid.* 325, per *Wilson*, J.

(u) *Ibid.* 326, per *Wilson*, J.

(v) *Ibid.* 325, per *Wilson*, J.

(w) *Reg. v. Desgagne*, Rob. Dig. 73.

(x) *Reg. v. Oulton*, 1 Allen, 269.

(y) *Re Joice*, 19 U. C. Q. B. 197.

Where a rule *nisi* for a *certiorari* to remove a conviction is discharged, the successful party is not entitled to the costs of opposing the rule. (z)

No separate application to supersede a *certiorari* need be made, but objection may be taken to it in showing cause to a rule to quash the conviction. (a)

Where irregularity is moved against as a substantive matter, the court might give an opportunity to amend; but if urged against the quashing of a bad conviction, no such opportunity is afforded. (b)

In showing cause to a rule *nisi* to quash a conviction, it was objected that the recognizance roll was irregular, being dated in the 32nd year of the reign of Her Majesty, while the conviction was in the 33rd; but held that this was only ground for a motion to quash the *certiorari* or the allowance of it, and that it could not be shown as a defect against quashing a bad conviction; and it would seem the objection to the recognizance could not be taken at that stage of the proceedings. (c)

The exercise of jurisdiction, in each of the circuit courts of New Brunswick, is not entirely confined to one particular judge, so as to exclude any other judge from sitting and holding the court, should occasion require; but the court, on every day on which it sits, is to be holden before some one of the judges of the Supreme Court. (d)

Where a circuit court is adjourned to a future day, in consequence of unfinished civil business, the criminal jurisdiction of the adjourned court is not confined to the trial of offences committed before the adjournment, or of indictments previously found. (e)

In the Province of Quebec the following points have been

(z) *Ex parte Daley*, 1 Allen, 435; see as to costs, *Reg. v. Ipstones*, L. R. 3 Q. B. 216.

(a) *Reg. v. McAllan*, 45 U. C. Q. B. 402.

(b) *Reg. v. Hoggard*, 30 U. C. Q. B. 156-7, per *Richards*, C. J.

(c) *Ibid.* 152.

(d) *Reg. v. Dennis*, 3 Allen, 425, per *Carter*, C. J.

(e) *Ibid.* 423.

decided: No motion to quash is necessary in cases of *certiorari*; (*f*) but in another case, simple inscription was held not sufficient without a rule to quash. (*g*) The motion to quash, if necessary at all, need not contain any reasons. (*h*) The six days' notice of the application for *certiorari* is not necessary in that province, the ordinary delay of one clear day being sufficient. (*i*) The merits of a *certiorari* may be heard on the merits of a rule to quash, without an inscription for hearing. (*j*) But such hearing must be had in one of the two divisions of the court appointed for such hearing in ordinary cases. (*k*) The conviction of an inferior tribunal will be quashed even after it has been enforced and executed. (*l*)

The police magistrate has jurisdiction to impose a fine of \$100 for assault. (*m*)

County courts have no jurisdiction in penal actions, unless it is expressly given them by statute. (*n*) They have, however, jurisdiction under R. S. O., c. 76, s. 3, to try an action for a penalty against a justice of the peace, where the penalty claimed does not exceed \$80. (*o*)

The court of Quarter Sessions does not possess any greater powers than are conferred on it by statute. It has, however, jurisdiction over offences attended with a breach of the peace. But forgery and perjury, not being attended with a breach of the peace, are not triable at the sessions. (*p*) Rape

(*f*) *Ex parte Thompson*, 5 Q. L. R. 200.

(*g*) *Ex parte Lanier*, 6 *Revue Leg.* 350; *ex parte Whitehead*, 14 L. C. J. 267.

(*h*) *Ibid.*

(*i*) *Ibid.*

(*j*) *Ex parte Murray*, 14 L. C. J. 101.

(*k*) *Ex parte Whitehead*, 15 L. C. J. 43.

(*l*) *Ex parte Thompson*, 5 Q. L. R. 200.

(*m*) *Ex parte Roy*, 5 *Revue Leg.* 452.

(*n*) *O'Reilly q. t. v. Allan*, 11 U. C. Q. B. 526.

(*o*) *Brash q. t. v. Taggart*, 16 U. C. C. P. 415.

(*p*) *Reg. v. McDonald*, 31 U. C. Q. B. 337-9; *Reg. v. Yarrington*, 1 Salk. 406; *Rex v. Haynes*, R. & M. 298; *Rex v. Higgins*, 2 Ea. 5; *Butt v. Conant*, 1 B. & B. 548; *ex parte Bartlett*, 7 Jur. 649; *Reg. v. Dunlop*, 15 U. C. Q. B. 118; *Reg. v. Currie*, 31 U. C. Q. B. 582.

also, though necessarily involving a breach of the peace, is not, it seems, within such jurisdiction. (*q*)

Under 32 & 33 Vic., c. 20, s. 48, the sessions of the peace cannot try the offences specified in sections 27, 28, and 29 of that Act. A similar provision is made by c. 21, s. 92, as to certain offences under it. By c. 29 of the same year, s. 12, no court of general or quarter sessions, or recorder's court, nor any court but a superior court, having criminal jurisdiction, shall have power to try any treason, or any felony punishable with death, or any libel. So neither can the sessions try coinage offences, (*r*) bribery or personation at Dominion elections, (*s*) nor offences against the Act for preventing lawless aggressions. (*t*) The enumerated exceptions contained in the foregoing statutes, and the excepted cases of forgery and perjury define, as nearly as may be, what the general jurisdiction of the sessions of the peace is. The unexcepted offences they may try; (*u*) for instance, kidnapping is within their jurisdiction. (*v*)

As the court of Quarter Sessions has no jurisdiction in perjury, a recognizance to appear for trial on such a charge at the sessions is wrong; but *certiorari* to remove it will be refused, if the time for the appearance of the party has gone by. (*w*)

The quarter sessions is a court of Oyer and Terminer, and a *venire de novo* may be awarded to it by the Queen's Bench. (*x*)

If an order of justices, in sessions, be defective in one part, it may be quashed as to that, and confirmed as to the rest, if the different parts can be separated. (*y*)

The court of Quarter Sessions has a general power to

(*q*) 32 & 33 Vic., c. 20, s. 49; 36 Vic., c. 50, s. 1.

(*r*) See 25 Ed. III., c. 2, s. 7; 31 Vic., c. 69, s. 4.

(*s*) 37 Vic., c. 9, s. 118.

(*t*) 31 Vic., c. 14.

(*u*) *Reg. v. McDonald*, 31 U. C. Q. B. 339, per *Wilson*, J.

(*v*) *Cornwall v. Reg.*, 33 U. C. Q. B. 106.

(*w*) *Reg. v. Currie*, 31 U. C. Q. B. 582.

(*x*) *Reg. v. McDonald*, 31 U. C. Q. B. 338, per *Wilson*, J.; *Campbell v. Reg.*, 11 Q. B. 799-814.

(*y*) *Reg. v. Simpson*, 1 Hannay, 32.

adjourn, unless an Act of Parliament plainly intimates an intention that they should not have such power. (z) The power of adjournment of any matter of which the court of sessions may be seized is inherent in the court, and such adjournment need not be to the next, but may be to any future court. Nor need there be a formal adjournment, if some proceeding is adopted by the court which virtually amounts to an adjournment. (a)

Where a statute enables two justices to do an act, the justices sitting in Quarter Sessions may do the same act; for they are not the less justices of the peace, because they are sitting in court in that capacity. (b)

It would seem that the chairman of the Quarter Sessions cannot make any order of the court, except during the sessions, either regular or adjourned. (c)

The sessions possess the same powers as the superior courts as to altering their judgments during the same sessions or term; and for that purpose the sessions, as the term, is all looked upon as one day. (d)

On the first day of the sessions, the appellant's counsel called on and proved his case. The respondent did not appear. It was not known that he had employed counsel, and the court ordered the conviction to be quashed. On the second day, counsel appeared and stated he had been employed, and was taken by surprise, and explained the reason of his non-appearance on the first day, to the satisfaction of the court and the appellant's counsel, and applied to have the order of the court, quashing the conviction, discharged. The chairman intimated that the application must not be understood in the nature of a new trial, and that if a jury had decided the case, the authority of the sessions to disturb the verdict might be doubted; but the court above held, on the authority

(z) See *Reg. v. Murray*, 27 U. C. Q. B. 134.

(a) *Reg. v. Justices of Westmoreland*, L. R. 3 Q. B. 457.

(b) *Fraser v. Dickson*, 5 U. C. Q. B. 233, per *Robinson*, C. J.

(c) *Re Coleman*, 23 U. C. Q. B. 615.

(d) *Reg. v. Fitzgerald*, 20 U. C. Q. B. 546, per *Robinson*, C. J.

of *Holborn v. Danes*, (e) that the sessions had power to revoke the order quashing the conviction, (f) and may alter their judgment at any time during the same session. (g)

It seems that the fact of a bench warrant having no seal does not make it invalid, (y) and a warrant of commitment under the seal of the court or signature of the chairman, is not necessary. (i)

An attorney-at-law has no right to act as an advocate in a court of Quarter Sessions, (j) and it is not in the power of county court judges to allow attorneys, who are not barristers, to practise before them as advocates in county courts. (k)

A party prosecuting under s. 28 of the Criminal Procedure Act, 1869, has no right to be represented by any other advocate than the representative of the Attorney General. (l)

The Attorney General or Solicitor General may delegate to counsel prosecuting for the Crown the authority vested in him under sec. 28 of the 32 & 33 Vic., c. 29, to direct an indictment to be laid before the grand jury for certain offences. (m)

It seems that the judges of every court have power to regulate its proceedings as to who shall be admitted to act as advocates, and that there is no positive rule of law to prevent any court of justice from allowing the attorney, even of a private individual, from acting as an advocate. (n) But it would seem that these remarks can only hold when there is no statute excluding the person permitted to act. (o)

When a case has been reserved for the opinion of the supe-

(e) 2 Salk. 494-606.

(f) *McLean and McLean*, 9 U. C. L. J. 217.

(g) *Ibid.*; *Re Smith*, 10 U. C. L. J. 29.

(h) *Fraser v. Dickson*, 5 U. C. Q. B. 234, per *Robinson*, C. J.

(i) *Ovens v. Taylor*, 19 U. C. C. P. 49.

(j) *Reg. v. Erridge*, 3 U. C. L. J. 32.

(k) *Re Brooke*, 10 U. C. L. J. 49; see also *Re Lapenotiere*, 4 U. C. Q. B. 492.

(l) *Reg. v. St. Armour*, 5 *Revue Leg.* 469.

(m) *Reg. v. Abrahams*, 24 L. C. J. 325.

(n) *Reg. v. Carter*, 15 L. C. R. 295-6, per *Meredith*, J.

(o) See *Re Judge*, C. C. York, 31 U. C. Q. B. 267.

rior court, the Court of Sessions are no longer in possession of it, either to pass sentence or for any other purpose. (*p*)

The power of fining and imprisoning, necessary to constitute a court of record, must be a general power, and a limited power of fining and imprisoning, such as the power to impose a specific pecuniary penalty and a certain number of days' imprisonment, does not constitute a court of record. (*q*)

A court of Quarter Sessions, being a court of record, has jurisdiction to fine for contempt of court; and a counsel was fined for using insulting language to a juryman, and thereby obstructing the business of the court. The Court of Queen's Bench will exercise a supervision in such cases, and see that the inferior court has not exceeded its jurisdiction. (*r*)

Criminal informations.—Where an indictment will lie for a misdemeanor, an information may also be sustained. (*s*)

Formerly any person might file a criminal information in the Queen's Bench, for a misdemeanor, against any other, and such informations were frequently resorted to as a means of extorting money. (*t*) The abuse was effectually put a stop to by the 4 & 5 W. & M., c. 18, which enacts: "The clerk of the Crown, in the King's Bench, shall not, without express orders given by the court in open court, receive or file any information for a misdemeanor before he shall have taken, or shall have delivered to him, a recognizance, from the person procuring such information, to be exhibited in the penalty of £20, conditioned to prosecute such information with effect."

The remedy, by criminal information, obtains in Quebec, and the duties and powers of the clerk of the Crown, in such cases, are analogous to those of the master of the Crown Office, or clerk of the Crown, in England. (*u*)

A party applying for a criminal information must declare

(*p*) *Reg. v. Boulbee*, 23 U. C. Q. B. 457.

(*q*) *Young v. Woodcock*, 3 Kerr, 554.

(*r*) *Re Pater*, 5 B. & S. 299; 10 Jur. N. S. 972.

(*s*) *Reg. v. Mercer*, 17 U. C. Q. B. 630-1, per *Burns*, J.

(*t*) *Arch. Cr. Prac.* 17.

(*u*) *Ex parte Gagy*, 9 L. C. R. 51.

that he waives all other remedies, whether by civil action or otherwise. (v)

It is an established rule that no application for a criminal information can be made against a justice, for anything done in execution of his office, without previous notice. (w)

The justice is entitled to six days' notice of the motion; and the motion must be made in time to enable the party accused to answer during the same term. (x) And where the motion was made after two terms had been suffered to pass, and after a court of Oyer and Terminer had been held in the district, it was refused. (y)

A motion for a rule for a criminal information, once discharged for irregularity or insufficiency of proof, cannot be renewed by amending the irregularity or supplying the deficiency of proof (z)

If the conduct of the prosecutor has been blamable, the court will not grant a criminal information against a magistrate at his instance; but if the conduct of the magistrate is not justifiable, the rule will be discharged without costs. (a)

The person in whose behalf the application is made cannot move the rule in person. (b) The motion must be made by a barrister or counsel. (c)

To support a motion for leave to file a criminal information against a justice of the peace, the affidavits should not be entitled in a suit pending. (d)

A criminal information must be signed by the clerk of the Crown or master of the Crown office. (e)

(v) *Ex parte Gury*, 9 L. C. R. 51; see also *Reg. v. Sparrow*, 2 T. R. 198; *Wakley v. Cooke*, 16 M. & W. 822.

(w) *Reg. v. Heming*, 5 B. & Ad. 666.

(x) *Reg. v. Heustis*, 1 James, 101; *Re Complaint Bustard v. Schofield*, 4 U. C. Q. B. O. S. 11.

(y) *Ibid.*

(z) *Ex parte Gury*, 9 L. C. R. 51.

(a) *Reg. v. Munro*, Stev. Dig. 411.

(b) *Ex parte Gury*, 9 L. C. R. 51.

(c) 1 Chit. Rep. 602.

(d) *Re Complaint Bustard v. Schofield*, 4 U. C. Q. B. O. S. 11; *Reg. v. Harrison*, 6 T. R. 60.

(e) *Reg. v. Crooks*, 5 U. C. Q. B. O. S. 733.

An information in the name of the Attorney General will be dismissed with costs, on an exception *à la forme*, it being signed by certain attorneys styling themselves "procureurs du Procureur Général," inasmuch as the Attorney General, when appearing for Her Majesty, cannot act by attorney. (*f*)

A criminal information by the Attorney General of New South Wales, against a member of the Legislative Assembly of that colony, for an assault on a member, committed within the precincts of the House while the assembly was sitting, in addition to charging the assault in fit and apt terms, averred that such assault was "in contempt of the said assembly, in violation of its dignity, and to the great obstruction of its business;" but the information was held good on demurrer, as the alleged contempt of the Legislative Assembly was the statement of a consequence resulting from the assault; and whether that consequence did or did not result from the assault, or whether it was a mere aggravation of the assault, was immaterial. The words did not alter the character, or the allegations with regard to the character, of the offence charged, and, if surplusage, they might be rejected. (*g*)

A criminal information, being the mere allegation of the officer who files it, may be amended. (*h*)

In an information for intrusion, the venue may be laid in any district, without regard to the local situation of the premises. (*i*)

Where there is no proof that the defendant has been out of possession for twenty years, the defendant cannot, under a plea of not guilty to an information of intrusion, give evidence of title under a Crown lease. (*j*)

On applications for criminal informations, the court is in the position of a grand jury, and requires the same amount

(*f*) *Attorney General v. Laviolette*, 6 L. C. J. 309.

(*g*) *Attorney General v. Macpherson*, L. R. 3 P. C. App. 268.

(*h*) *Re Conklin*, 31 U. C. Q. B. 167, per *Wilson*, J. .

(*i*) *Attorney General v. Dockstader*, 5 U. C. Q. B. O. S. 341.

(*j*) *Reg. v. Sinnott*, 27 U. C. Q. B. 539.

of evidence as would warrant a grand jury in finding a true bill; (*k*) and the case for the prosecution may be disproved by affidavit on showing cause, and the application discharged with costs on such evidence. (*l*)

Criminal informations will be granted only when affecting persons occupying official or judicial positions, and filling some office which gives the public an interest in the speedy vindication of their character, or to cases of a charge of a very grave and atrocious nature; and the manager of a large railway company was therefore held not entitled to this special favor, (*m*) and one learned judge expressed grave doubts as to its propriety in any case. (*n*)

A rule *nisi* for a criminal information for libel having been obtained against J. S., on affidavits which stated that a copy of a newspaper had been purchased from a salesman in the office of the newspaper, and that, by a foot-note to the newspaper, J. S. was stated to be the printer and publisher of the newspaper, and that the deponent believed J. S. to be the printer and publisher, the court discharged the rule on the ground that the affidavit contained no legal evidence of publication, and that an affidavit on information and belief was not legal evidence. But a defect in the affidavits on which the rule *nisi* for a criminal information has been obtained, may be supplied by a statement in an affidavit of the defendant, made in showing cause against the rule. (*o*) The affidavit, upon which the application is made, must disclose all the material facts of the case, and if a material fact be suppressed or misrepresented, the court will discharge the rule, very probably with costs. (*p*)

Bail.—The object in committing parties to prison is to

(*k*) *Ex parte Gugg*, 9 L. C. R. 51.

(*l*) *Rex v. Bates*, Stev. Dig. 411.

(*m*) *Reg. v. Wilson*, 43 U. C. Q. B. 583; following *ex parte Davidson*, London *Times* of 2nd August, 1878.

(*n*) *Ibid.*

(*o*) *Reg. v. Stanger*, L. R. 6 Q. B. 352.

(*p*) *Reg. v. Willett*, 6 T. R. 294; *Reg. v. Williamson*, 3 B. & Ald. 582; Arch. Cr. Pldg. 113.

ensure their appearance to take their trial, and the same principle is to be adopted on an application for bail. It is not a question as to the guilt or innocence of the prisoner, but of the probability of his appearing to stand his trial. (q) On this account, it is necessary to see whether the offence is serious and severely punishable, and whether the evidence is clear and conclusive. (r)

Where the charge against a prisoner is that he procured a person to set fire to his house, with intent to defraud an insurance company, and it is shown that the prisoner attempted to bribe the constable to allow him to escape, the probability of his appearing to stand his trial is too slight for the judge to order bail. (s) And this even though some months must elapse before a criminal court competent to try the case would sit. (t)

On an application by prisoners in custody on a charge of murder under a coroner's warrant, it is proper to consider the probability of their forfeiting their bail, if they know themselves to be guilty, and where, in such a case, there is such a presumption of the guilt of the prisoners as would warrant a grand jury in finding a true bill, they should not be admitted to bail. (u)

A prisoner confined upon a charge of arson may be admitted to bail after a bill found by a grand jury, if the depositions against him are found to create but a very slight suspicion of his guilt. (v) A prisoner in custody for larceny may be admitted to bail, when the evidence discloses very slight grounds for suspicion. (w) So upon a charge of aggravated assault. (x)

So a prisoner charged with murder may, in some cases, in the exercise of a sound discretion, be admitted to bail.

(q) *Ex parte Maguire*, 7 L. C. R. 59.

(r) *Reg. v. Brynes*, 8 U. C. L. J. 76; *Reg. v. Scaife*, 9 Dowl. P. C. 553.

(s) *Reg. v. Brynes*, *supra*.

(t) *Ibid*.

(u) *Reg. v. Mullady*, 4 U.C.P.R. 314. ; *ex parte Corriveau*, 6 L.C.R. 249.

(v) *Ex parte Maguire*, 7 L. C. R. 57.

(w) *Reg v. Jones*, 4 U. C. Q. B. O. S. 18.

(x) *Re McKinnon*, 2 U. C. L. J. N. S. 324.

And where, on a trial for that crime, the jury disagreed, the court has admitted a prisoner to bail. (y) But usually, where a true bill has been found on an indictment for murder, bail will be refused. (z)

On an application for bail, the court may look into the information, and, if they find good ground for a charge of felony, may remedy a defect in the commitment, by charging a felony in it, so that the prisoner would not be entitled to bail on the ground of the defective commitment. (a) A person charged with having murdered his wife, in Ireland, will not be admitted to bail until a year has elapsed from the time of the first imprisonment, although no proceedings have in the meantime been taken by the Crown, and no answer has been received to a communication from the Provincial to the Home Government on the subject. (b)

A prisoner charged with felony may be released on bail, if it is satisfactorily established that, unless liberated, he will in all probability not live until the time fixed for his trial. (c)

Prisoners charged with murder cannot be admitted to bail, unless it be under very extreme circumstances, as where facts are brought before the court to show that the bill cannot be sustained. The fact that prisoners indicted for wilful murder cannot be tried until the next term, is no ground for admitting them to bail. (d) Accessories after the fact, who have merely harbored prisoners guilty of murder, may be admitted to bail. (e)

The court may order bail in a case of perjury. (g) And indeed, under 32 & 33 Vic., c. 30, it is obligatory upon justices of the peace to admit to bail in all cases of misde-

(y) *Ex parte Baker*, 3 *Revue Critique*, 45.

(z) *Reg. v. Keeler*, 7 U. C. P. R. 117.

(a) *Reg. v. Higgins*, 4 U. C. Q. B. O. S. 83.

(b) *Reg. v. Fitzgerald*, 3 U. C. Q. B. O. S. 300.

(c) *Ex parte Blossom*, 10 L. C. J. 71, per *Meredith*, J.

(d) *Reg. v. Murphy*, 1 James, 158.

(e) *Ibid.*

(g) *Reg. v. Johnson*, 8 L. C. J. 285.

meanors. The statute is equally binding upon the judges of the superior courts. (i)

The word "shall," in s. 56 of this statute, is imperative. (j) Therefore, where prisoners had been twice tried for misdemeanors, and the juries on both trials discharged because of disagreement, an order of the Court of Queen's Bench, Crown side, that the prisoners be committed to gaol without bail or mainprize, to stand their trial at the next term, and not to be discharged without further order from the said court, was held void. (k)

The word "may," in the 32 & 33 Vic., c. 30, s. 52, must be considered as conferring a power, and not as giving a discretion. The object of the Act is to declare that one justice cannot bail in felony, but may in misdemeanor. (l)

Although a statute may require the presence of three persons to convict of an offence, yet one has power to bail the offender in all cases of misdemeanor, by the common law unless prevented by some statute. (m)

Where two juries have disagreed and been discharged, on the trial of a person for misdemeanor, the law, from these circumstances, raises such a presumption of innocence as to entitle him to his discharge on bail. (n)

Where the prisoners were convicted at the sessions, on an indictment for felony, and a case reserved for the opinion of the Queen's Bench, which had not been argued, a judge in chambers refused to bail, except with the consent of the Attorney General, (o) for the Cou. Stats. U. C., c. 112, vested the discretion to bail, upon a case reserved, in the court which tried the prisoners. (p)

The fact of one assize having passed over since the committal of the prisoners, without an indictment having been

(i) *Ex parte Blossom*, 10 L. C. J. 73, per *Meredith*, J.

(j) *Ibid.* 35, 67-8.

(k) *Ibid.* 35-46.

(l) *Ibid.* 67, per *Meredith*, J.

(m) *King v. Orr*, 5 U. C. Q. B. O. S. 724.

(n) *Ex parte Blossom*, 10 L. C. J. 29-45.

(o) *Reg. v. Sage*, 2 U. C. P. R. 138.

(p) *Ibid.* 139, per *Robinson*, C. J.

preferred, is in itself no ground for admitting them to bail ; and it can have no other influence than to induce a somewhat closer examination of the evidence on which the prisoner is committed. Where the prisoner does not bring himself within the 31 Car. II., c. 2, s. 7, by praying, on the first day of the assizes, to be brought to trial, as the Crown is not therefore bound to indict him at that court, the granting of bail is discretionary, and cannot be claimed as a right. (q)

After the accused has pleaded not guilty to an indictment, no default can be recorded against him without notice, unless it be on a day appointed for his appearance. (r)

Where a party accused of perjury has been arraigned and has pleaded not guilty, and no day certain has been fixed for the trial, and no forfeiture of his bail has been declared, the mere failure of the party, when called upon to answer in the term subsequent to that in which he was arraigned, cannot operate as a forfeiture of such bail. (s)

If an offence is bailable, and the party, at the time of his apprehension, is unable to obtain immediate sureties, he may at any time, on producing proper persons as sureties, be liberated from confinement. (t)

A person accused of theft had given a recognizance of bail, but after the finding of the indictment against him by the grand jury, and before trial, had absconded. A rule *nisi*, to enter up judgment on the recognizance, was obtained, on an affidavit of the clerk of the Crown, of the fact of a recognizance having been entered into by the defendant, of the signature of the justices of the peace thereto, and its return into the superior court, and the non-appearance of the party to plead to the indictment. A copy of this rule, together with a copy of the affidavit, was served on each of the defendants. It was held that the rule *nisi* was proper, instead of a proceeding by *scire facias*, and that such judgment might be

(q) *Reg. v. Mullady*, 4 U. C. P. R. 314.

(r) *Reg. v. Oroteau*, 9 L. C. R. 67.

(s) *Attorney General v. Beaulieu*, 3 L. C. J. 117.

(t) *Ex parte Blossom*, 10 L. C. J. 68, per *Meredith, J.*

properly entered on an affidavit of the service of the rule *nisi* therefor on the bail, and their failing to show cause. (u)

Where bail entered into a recognizance conditioned for the appearance of their principal to answer a charge of assault with intent to commit rape, and the only bill found against the accused was for the more serious offence of rape, and his recognizance was estreated for his non-appearance to answer that charge, a rule *nisi* was made absolute for their relief from the estreated recognizance, for they did not become bail for the appearance of the accused to answer a charge of rape, and therefore his non-appearance to answer that charge was no breach of the recognizance. (v)

In an ordinary recognizance of bail, on an indictable charge, the accused is not bound to appear unless a bill be found against him. Where, therefore, the accused was called, though the grand jury had not, owing to absence of witnesses, an opportunity of finding a bill, and the recognizance was estreated, a rule was made absolute for the relief of the bail. (w) And a recognizance which omits the words "to owe" is void. (x)

Defendant, having entered into a recognizance to appear at a certain assizes, attended until the last day, when he left, assuming, as no indictment had been found, that the charge against him was not intended to be prosecuted. He was, however, called, and his recognizance estreated. The court, under the circumstances, relieved him and his sureties, under the Con. Stats. U. C., c. 117, s. 11, on payment of costs, and on his entering into a new recognizance to appear at the following assizes. (y)

It is no ground for discharging the estreat of a recognizance of bail that the accused did not receive from the justice, who

(u) *Reg. v. Thompson*, 2 Thomson, 9 ; affirmed by *Reg. v. Cudihy*, 1 Oldright, 701.

(v) *Reg. v. Wheeler*, 1 U. C. L. J. N. S. 272.

(w) *Reg. v. Ritchie*, 1 U. C. L. J. N. S. 272.

(x) *Reg. v. Hoodless*, 45 U. C. Q. B. 558.

(y) *Reg. v. McLeod*, 24 U. C. Q. B. 458.

took the recognizance, the notice directed to be given by the 7 William IV., c. 10, s. 8. (z)

When a recognizance is entered into for the appearance of the accused in the Court of Queen's Bench, it is the duty of the judges of that court to estreat the recognizance in the event of forfeiture. (a)

Where a prisoner charged with felony had been admitted to bail upon an order of a judge in chambers, and an application was subsequently made to rescind such order and to recommit the prisoner to gaol, on the ground that he had not been committed for trial at the time such order was granted, being in custody only under a warrant of remand, and also upon the ground that the bail put in was fictitious; the court held that a judge in chambers had the power to make the order asked for; that when bail are insufficient or fictitious better sureties may be ordered; and the sureties in this case appearing to be fictitious, the order was conditional upon the failure of the prisoner to find new sureties within a specified time. (b)

An application for bail must be made upon affidavits entitled "In the Queen's Bench," verifying copies of the depositions. (c) The affidavits should be accompanied by a certified copy of the commitment. (d)

Where a prisoner makes application to a judge in chambers to be admitted to bail to answer a charge for an indictable offence, under the 32 & 33 Vic., c. 30, s. 61, the copies of information, examination, etc., may be received, though certified by the County Crown Attorney and not by the committing justice. Under ss. 38 and 58 of this statute, the committing magistrate has still power to certify copies of the information, examination and depositions close under his hand and seal. (e)

(z) *Reg. v. Schram*, 2 U. C. Q. B. 91.

(a) *Reg. v. Croteau*, 9 L. C. R. 67.

(b) *Reg. v. Mason*, 5 U. C. L. J. N. S. 205; 5 U. C. P. R. 125.

(c) *Reg. v. Barthelmy*, 1 E. & B. 8; Dears. 60.

(d) Arch. Cr. Pldg. 89.

(e) *Reg. v. Chamberlain*, 1 U. C. L. J. N. S. 157; *ibid.* 142; see also *Con. Stats. U. C. c. 106, s. 9.*

Juries.—The institution of grand juries, if not carefully guarded, is liable to abuse, as it furnishes facilities for fraud and oppression by giving an opportunity to a wicked person to go before a secret tribunal, and, without notice to the party accused, have a bill of indictment found against him, which, whether true or false, may be used as an engine of extortion; further proceedings may be abandoned if the prosecutor can be bribed, so that justice is defeated if the defendant be guilty, or an infamous wrong may be inflicted upon him if innocent. The 32 & 33 Vic., c. 29, s. 28, amended by the 40 Vic., c. 26, was passed with a view to suppress vexatious proceedings of this description. But it is not necessary that the performance of any of the conditions mentioned in this statute should be averred in the indictment, or proved before the petty jury. (*f*)

The proceedings of grand juries are subject to the revision of the courts, and will be quashed if irregular. Thus, where a prosecutor was on the panel of grand jurors, who found a true bill, the indictment was quashed; and it made no difference that he was not present when the bill was found. (*g*)

It is no objection, however, to a grand jury panel that a juror whose name is on the list has not been summoned, or that a person has been summoned whose name was by error omitted from the list, but afterwards added by the clerk of the court. (*h*)

Nor is it a ground for quashing an indictment that some of the grand jury were related to the officer who arrested the prisoner. (*i*) No more is a sheriff disqualified from summoning the jurors because he has directed the arrest. (*j*)

When the indictment is preferred by the direction, or with the consent in writing, of a judge of one of the superior courts, it is for the judge, to whom the application is made

(*f*) *Knowlden v. Reg.*, 5 B. & S. 532; 33 L. J. (M. C.) 219.

(*g*) *Reg. v. Cunard*, Ber. (N. B.) 326.

(*h*) *Reg. v. Mailloux*, 3 Pugsley, 493.

(*i*) *Ibid.*

(*j*) *Ibid.*

for such direction or consent, to decide what materials ought to be brought before him, and it is not necessary to summon the party accused, or to bring him before the judge. (*k*)

Where three persons were committed for conspiracy, and afterwards the Solicitor General, acting under this statute, directed a bill to be preferred against a fourth person who had not been committed, and all four were indicted together for the same conspiracy, such a course was held to be unobjectionable. (*l*)

It seems that where, in a civil action, the jury find a party guilty of a crime, as where in an action on a policy of insurance against fire arson is set up in the plea, and the jury find the party guilty thereof, the plaintiff may be tried on this finding for the criminal offence without the finding of the grand jury. (*m*)

The evidence offered to a grand jury is evidence of accusation only. It is to be given and heard in secret according to the oath administered. The accused has no right to appear before or be heard by the grand jury, either for the purpose of examining his accuser or of offering exculpatory evidence.

Evidence before a grand jury can only be received under the sanction of an oath, so that if any false statement be made, the person may be punished. The oath may be administered by the foreman; but it can only be administered when the jury are assembled as such.

The law requires that twelve members should be present for the purpose of any inquiry, and twelve of them must assent to any accusation.

When a charge is presented to a grand jury, they should consider whether the accused is capable of committing the crime, and this involves the criminal liability of infants, persons *non compotes mentis*, married women, etc.

(*k*) *Reg. v. Bray*, 3 B. & S. 255; 32 L. J. (M. C.) 11.

(*l*) *Knowlden v. Reg.*, *supra*; Arch. Cr. Pldg. 5.

(*m*) *Richardson v. Can. W. F. Ins. Co.*, 17 U. C. C. P. 343, per *J. Wilson, J.*

A reasonable conclusion only is required, and the rest is for the jury on the trial. They must have reasonable evidence of the *corpus delicti*, and that the accused is the guilty person. The intent laid or charged against the accused should clearly appear, either expressly or by necessary implication, from the circumstances. (n)

The record of a conviction for murder set out in the caption that the indictment was found at a general session of Oyer and Terminer and General Gaol Delivery, before the chief justice of the Common Pleas, duly assigned, and under and by virtue of the statute in that behalf, duly authorized and empowered to inquire, etc., setting out the authority to hear and determine, as formerly given in commissions, but not to deliver the gaol. It was then stated that, at the said session of Oyer and Terminer and General Gaol Delivery, the prisoner appeared and pleaded, and the award of *venire* was, "therefore let a jury thereupon immediately come," etc. This record was returned to a writ of error, directed, "To our Justices of Oyer and Terminer for our county of C., assigned to deliver the gaol of the said county of the prisoners therein being, and also to hear and determine all felonies, etc." On error brought, it was held that the authority of the justice sufficiently appeared without any statement whether a commission had issued or been dispensed with by order of the governor, for such courts are now held not under commissions, but by virtue of the statute, Con. Stats. U. C., c. 11, as amended by 29 & 30 Vic., c. 40, and as the record sufficiently showed the absence of any commission, it must be presumed that it seemed best to the governor not to issue one. The record showed the court to be held by a person competent to hold it, either with or without a commission, and was therefore sufficient. (o) But it would seem that if the court had been held by a Queen's counsel, or county court judge, it might have been necessary to show whether a commission had issued or not, because he would only have authority if

(n) See charge of Mr. Jus. *Burns*, 8 U. C. L. J. 6.

(o) *Whelan v. Reg.*, 28 U. C. Q. B. 2.

named in the commission, or appointed by one of the superior court judges.

It would seem, also, that if the caption had been defective, it might have been rejected altogether under Con. Stats. Can., c. 99, s. 52.

In the same case, it was objected that the only authority shown being that of Oyer and Terminer, the award, "therefore let a jury thereupon immediately come," was unauthorized, and a special award of *venire facias* was requisite; the court held, assuming, but not admitting, that in England there is a difference in this respect between the power of justices of Oyer and Terminer and of Gaol Delivery, and that the record showed no authority to deliver the gaol, that in this country, by the Jury Act, Con. Stats. U. C., c. 31, both have the same powers, the general precept to summon a jury being issued by both before the assizes. (*p*)

A judge of assize, as such, may, by force of the statute 27 Edw. I., c. 3, deliver the gaol without any special commission for that purpose. (*q*)

The court is bound to take judicial notice of the powers of a court of General Gaol Delivery, and, wherever it is recited on a record that anything was done at such a court, if it is found that such court has power to do the thing recited, it must be held to be rightly done. (*r*)

As to serving on juries, infancy has been considered a ground of disqualification, on account of the probable deficiency of understanding. Being over the prescribed age has been considered only a ground for not returning the juryman, and there is no known head of challenge under which the objection can be made to a juryman over the prescribed age, if otherwise competent. The statute 13 Edw. I., c. 38, being in the affirmative, leaves infants disqualified as at common law. (*s*)

(*p*) *Whelan v. Reg.*, 28 U. C. Q. B. 2.

(*q*) *Ibid.* 44, per *A. Wilson*, J.

(*r*) *Ibid.* 85, per *Richards*, C. J.

(*s*) *Mulcahy v. Reg.*, L. R. 3 E. & I. App. 315, per *Willes*, J.

This statute enacts, in peremptory terms, that old men above the age of seventy years shall not be put upon juries. But the prohibition in the statute was not intended as a disqualification, but merely as an exemption; for if they were put upon the panel, they could not be challenged. (t)

The R. S. O., c. 48, makes a clear distinction between disqualification and exemption. Where, therefore, a juryman was returned whose age exceeded sixty years, that fact only operated in his favor as an exemption, but was not a ground for challenge as a personal disqualification. By this statute every one between the ages of twenty-one and sixty was qualified. By sec. 7, every person upwards of sixty years of age is absolutely freed and exempted from being returned and from serving on juries, and shall not be inserted in the rolls to be prepared and reported by the selectors of jurors.

An alien, qualified and resident as the statute prescribes, may be a juror in Nova Scotia. (v)

By s. 11 of R. S. O., c. 48, no man, not being a natural born or naturalized subject of Her Majesty, shall be qualified to serve as a grand or petit juror; so that now, juries *de medietate linguæ* having been abolished, an alien is never admitted as a juror in the Province of Ontario.

Objection to the jury panel, after verdict, can only be taken by writ of error. (w)

The object of a challenge is to have an indifferent trial. (x)

The right of peremptory challenge, at common law, was a principal incident of the trial of felony. This right cannot be taken away by implication from the terms of a statute, unless such implication is absolutely necessary for the interpretation of the statute. (y)

In felonies, as well as misdemeanors, the Crown had the right of challenging any number of jurors peremptorily, without assigning any cause, until the panel was exhausted. (z)

(t) *Milcahy v. Reg.*, L. R. 3 E. & L. App. 325.

(v) *Reg. v. Burdell*, 1 Oldright, 126.

(w) *Reg. v. Kennedy*, 26 U. C. Q. B. 326.

(x) *Levinger v. Reg.*, L. R. 3 P. C. App. 287, per Sir J. Napier.

(y) *Ibid.* 289, per Sir J. Napier.

(z) *Reg. v. Fellowes*, 19 U. C. Q. B. 48.

The 32 & 33 Vic., c. 29, s. 38, enacts that, in all criminal trials, whether for treason, felony or misdemeanor, four jurors may be peremptorily challenged on the part of the Crown. The right of the Crown to cause any juror to stand aside until the panel has been gone through, or to challenge any number of jurors for cause, is not affected by this statute.

Even before the statute, on a trial for misdemeanor, as well as for felony, the Crown might, without showing cause, direct jurors, on their names being called by the clerk of the court, to "stand aside" until the panel was gone through, (a) and so a second time till the panel is exhausted; that is, till it appears that a jury cannot be obtained without such juror. (b)

This was the well understood practice on indictments for felony as well as misdemeanor, and it is said that, before the statute 33 Edward I., st. 4, (c) the King might challenge peremptorily, without showing cause, but that Act was construed to restrain the privilege, and to require the Crown to show cause if the panel was otherwise exhausted. (d) The restriction in practice thus imposed on the Crown is, that it shall not exercise its prerogative so as to make it necessary to put off the trial for want of a jury, such as the party arraigned is entitled to have on his trial. (e)

The 37 Vic., c. 38, s. 11, which enacts that the right of the Crown to cause jurors to stand aside shall not be exercised "on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel," applies to libels on individuals as distinguished from seditious and blasphemous libels; and it makes no difference that the Crown is represented by the Attorney General; (f) and if the judge at the trial on such a case allow the right and

(a) *Reg. v. Fraser*, 14 L. C. J. 245; *Reg. v. Benjamin*, 4 U. C. C. P. 179; *Reg. v. Chasson*, 3 Pugsley, 546; *Reg. v. Hogan*, 1 L. C. L. J. 70; *Reg. v. Dougall*, 18 L. C. J. 85.

(b) *Reg. v. Lacombe*, 13 L. C. J. 259.

(c) See Con. Stats. U. C., c. 31, s. 101.

(d) *Reg. v. Benjamin*, 4 U. C. C. P. 185, per *Macaulay*, C. J.

(e) *Levinger v. Reg.*, L. R. 3 P. C. App. 288, per Sir *J. Napier*.

(f) *Reg. v. Patterson*, 36 U. C. Q. B. 127.

afterwards doubt the propriety of his ruling, he may reserve the point for the decision of the court above. (g)

Calling the list over once is not exhausting the panel. (h)

The direction to stand aside is not, in fact, a challenge. (i) But it is, in effect, equivalent to a peremptory challenge if, without having to resort to such of the jurors as have been "set by" for the time, on the part of the Crown, there can be procured from those returned on the panel enough of jurors, not objected to, to make a jury. (j)

After the prisoner had been arraigned on his trial for murder, had pleaded not guilty, and received the usual notice of his right to challenge, two jurors were called who were not challenged by him, and were thereupon sworn. The name of John Hill was then called, and a person answering to that name came forward, and was sworn without challenge or objection. Some others were afterwards called, and on being challenged peremptorily by the prisoner, they withdrew; and, after another was called and sworn without challenge, the prisoner's counsel objected to John Hill, as he was a witness in the case for the prosecution. Upon inquiry it was found that there was a person named John Hill returned on the panel, but that he was a different person from the John Hill sworn on the jury, and that the latter was not only a witness but also a resident of another county, and therefore not qualified to act as a jurymen. Upon consent of both the counsel for the Crown and the prisoner, he was allowed to retire, and other jurymen were called and sworn until the panel was full, the prisoner exercising the right of challenge until the jury was chosen. The juror was withdrawn before the prisoner was given in charge. The prisoner was tried and convicted, and, upon motion for a new trial, the court held, first, that the John Hill improperly sworn was

(g) *Reg. v. Patteson*, 36 U. C. Q. B. 127.

(h) *Reg. v. Lacombe*, 13 L. C. J. 261, per *Mont*, J.; and see *Munsell v. Reg.*, 8 E. & B. 54; *Dears. & B.* 375; see 32 & 33 Vic., c. 29. s. 41, as to supplying defect of jurors, if the panel is exhausted.

(i) *Reg. v. Lacombe*, *supra*, 261, per *Badgley*, J.

(j) *Levinger v. Reg.*, *supra*, 288, per *Sir J. Napier*.

legally discharged from the jury ; second, that his discharge did not operate upon the jurors previously sworn, so as to render it necessary to reswear them, and thus reopen the prisoner's right of challenge to them ; and third, that though thirteen persons were sworn to try the prisoner, the twelve by whom he was tried constituted the jury for his trial ; in other words, that he was properly tried by the twelve who constituted the jury. (*k*)

If a jury be elected, tried and sworn, and charged with a prisoner, and afterwards discharged without giving a verdict, either because they cannot agree, or with the assent of counsel, a new jury will be called and sworn in the ordinary way, and the prisoner will have the usual right of challenge. (*l*)

A prisoner is entitled to challenge for cause before exhausting his peremptory challenges ; and error will lie for the refusal of this right ; but if the prisoner, after an erroneous decision of the judge on this point, peremptorily challenge a juror whom he might have challenged for cause, he waives his right in respect of such erroneous decision, and error cannot be brought. (*m*)

If, after the improper disallowance of a challenge for cause, the prisoner withdraw his plea of not guilty, and plead guilty, that would cure the objection, because the whole record must be looked at, and not a merely isolated part of it ; for one part of it may be controlled by another, and that which may be a cause of exception in one place, may be no exception when read in connection with the rest of the record. (*n*)

A prisoner, arraigned for uttering forged paper, has a right to challenge peremptorily, on the trial of a preliminary question, to the effect that the prisoner had been extradited from the United States on a charge of forgery. (*o*)

(*k*) *Reg. v. Coulter*, 13 U. C. C. P. 299.

(*l*) *Ibid.*

(*m*) *Whelan v. Reg.*, 28 U. C. Q. B. 2 ; affirmed on appeal, *ibid.* 108.

(*n*) *Ibid.* 164, per *A. Wilson, J.*

(*o*) *Reg. v. Paxton*, 10 L. C. J. 212.

It is a good cause of challenge to a juror, if he has said he would hang the prisoner if on his jury. (*p*)

A statute directed a jurors' book to be made up in each year, for use in the year following, and declared that such book should be in use from the first of January, for and during one year. In November, 1865, at a sitting of a special commission, a panel was returned from the then existing jury book. The jurors were not then called, but the sitting was duly adjourned to the 19th of January, 1866, at which time the trial took place, when the jurors named in the return of November, 1865, were called. One of the jurors, who had been duly returned in November, 1865, not being in the list for 1866, it was held that this was not a ground of challenge to him. Nor did these facts show any ground for challenge to the array. (*q*)

The prisoner may challenge the array if affinity exists between the sheriff and himself; (*r*) and if he apprehend that the array will be challenged on that account, he may have the process directed to the coroner, with the consent of the other party; and if the other do not consent, but insists there is no cause for the change of process, he cannot afterwards take advantage of the objection which he has himself alleged to be futile. (*s*)

It is a ground of such challenge that the prisoner has had an action pending against the sheriff for assault. (*t*)

The inclusion of unauthorized names on a petit jury panel is not a ground of challenge to the array; (*u*) nor is the summoning of an excessive number, in which event the unnecessary ones may be struck off by the judge. (*v*)

Where a wrong juror by mistake answered the call of the clerk, and served on the jury, it was held by a majority of

(*p*) *Whelan v. Reg.*, 28 U. C. Q. B. 29.

(*q*) *Mulcahy v. Reg.* L. R. 3 E. & I. App. 306.

(*r*) *Wetmore v. Levi*, 5 Allen, 180.

(*s*) *Whelan v. Reg.*, 28 U. C. Q. B. 54.

(*t*) *Reg. v. Mitne*, 4 Pugsley & B. 394.

(*u*) *Reg. v. Mailloux*, 3 Pugsley, 493.

(*v*) *Ibid.*

the court in Quebec that there had been a mis-trial ; (w) but in England, in a similar case, the majority held it only a ground of challenge. (x)

An order for an extra panel under R. S., c. 92, s. 37, of Nova Scotia, is valid if signed by three judges, though they do not constitute a majority. (y)

Where the Crown demurred to a challenge to the array, and the judge on overruling the demurrer granted leave to traverse, it was held a matter in the discretion of the judge, and not reviewable. (z)

Where the facts stated in the challenge would not of necessity disqualify the sheriff from summoning a jury, and might or might not render him partial, the challenge is to the favor, and it should, in addition to the facts relied upon, contain an allegation that the sheriff was not impartial, otherwise it will be bad. (a)

It is in the discretion of the judge whether to require a challenge to the polls to be in writing. (b)

Expressions used by a jurymen are not a cause of challenge, unless they are to be referred to something of personal ill-will toward the party challenging ; and the jurymen himself is not to be sworn when the cause of challenge tends to his dishonor, as whether he has been guilty of felony, or whether he has expressed a hostile opinion as to the guilt of the prisoner. (c) He may, however, be examined on the *voir dire* as to his qualification, or the leaning of his affections. (d)

If one of the jury be taken ill at the trial the judge cannot, even with the consent of the prisoner, swear another juror in his place and continue the trial ; and the objection

(w) *Reg. v. Feare*, 3 Q. L. R. 219, following *Reg. v. Miller*, 1 Dears. 468.

(x) *Reg. v. Mellor*, 4 U. C. L. J. 192 ; Dears. & B. 468.

(y) *Reg. v. Quinn*, 1 Russ. & Geld. 139.

(z) *Reg. v. Mailloux*, 3 Pugsley, 493.

(a) *Brown v. Maltby*, 4 Pugsley & B. 92.

(b) *Reg. v. Chasson*, 3 Pugsley, 546.

(c) *Ibid.*

(d) *Ibid.*

is not waived by the prisoner's counsel afterwards addressing the jury. (e)

A statement by one of the jury, previously to their giving their verdict, that a newspaper had been handed to them, cannot be recorded in the register of the court. (f) And an affidavit by a party to a suit, simply stating that he is informed and believes that one of the jurymen was under age, will not be considered evidence of the fact. (g)

At any time before a juror is sworn, he may be examined as to his qualification, whether before or after the peremptory challenges are exhausted, in order to ascertain whether he is a person qualified to be a juror. (h)

If thirteen jurors are sworn to try the prisoner, the swearing of the thirteenth would be void, and the other twelve would constitute the jury. (i)

Though a challenge has been improperly disallowed, yet, if no improper person get on the jury, their verdict, when none of them are disqualified, supports the judgment on the indictment. (j)

If, after a prisoner's challenge to a juror is disallowed, the Crown then challenged him, and the prisoner objected to it, unless the Crown showed cause, in the first instance, or the prisoner contended the cause shown by the Crown was insufficient, this would be a consenting to the juror as a proper jurymen to be admitted to try the cause, or a waiver of all objection to him, and the prisoner could not, after that, revive his own original exception. (k)

So, after the improper disallowance of a challenge to one juror, the prisoner would be bound to renew his exceptions specifically to any jurors called afterwards, in order to establish a ground of error, or cause of complaint as to them. (l)

(e) *Noble v. Billings*, 3 Allen, 85.

(f) *Reg. v. Notman*, 4 C. L. J. 41.

(g) *Reg. v. Perley*, 2 Pugsley, 449.

(h) *Whelan v. Reg.*, 28 U. C. Q. B. 54.

(i) *Reg. v. Coulter*, 13 U. C. C. P. 303, per *Draper*, C. J.

(j) *Whelan v. Reg.*, 28 U. C. Q. B. 137, per *Draper*, C. J.

(k) *Ibid.* 53-4.

(l) *Ibid.* 61, per *A. Wilson*, J.

It is settled law that a juryman must be challenged before he is sworn, and cannot afterwards be withdrawn except by consent. (m)

A prisoner cannot challenge at all until a full jury appears, and he must challenge to the array before he challenges to the polls. He must abide by his peremptory challenge when he makes it, and cannot withdraw it and challenge another juror instead. The prisoner must also show all his causes of objection before the Crown is called upon to show cause. The party beginning to challenge must finish all his challenges before the other begins, and all challenges of the same kind and degree must be suggested against the juror at the same time. (n)

When there are two prisoners for trial, it would not be ground of error if the judge directed one of them to challenge first, and to make his peremptory challenges before his challenges for cause, and then allow the other his challenges in like order. In such latter case, on a juror being called against whom there was a cause of challenge to the favor, he would not be challenged peremptorily, but would go into the jury box to abide the result of all the challenges; and, when the peremptory challenges were through, those for cause would be proceeded with, and the juror would then be reached. (o)

When a prisoner, on his trial, assumes to challenge a juror for cause, it is competent for the Crown either to demur or to counterplead; that is, set up some new matter consistent with the matter of challenge, to vacate and annul it as a ground of challenge, or to deny the truth, in point of fact, of what is alleged for matter of challenge. (p) The latter mode is the only one calling for the intervention of triors. (q)

(m) *Reg. v. Coulter*, 13 U.C.C.P. 301, per *Draper*, C.J.; *Reg. v. Mellor*, 4 Jur. N. S. 214.

(n) *Whelan v. Reg.*, 28 U. C. Q. B. 49.

(o) *Ibid.* 47-50.

(p) *Ibid.* 168-9, per *Gwynne*, J.

(q) *Ibid.*

The Con. Stats. U. C., c. 31, s. 139, provides that no omission to observe the directions of the Act, or any of them, as respects the "selecting jury-lists from the jurors' rolls," or "the drafting panels from the jury-lists," shall be ground for impeaching the verdict.

Possibly the array might be quashed, if the sheriff's return to the court contained the names of jurors resident out of the county for which they were summoned. (r)

In Ontario, the usual practice as to summoning jurors is as follows: A precept, signed by the judges, who are always named in both commissions of Oyer and Terminer and Gaol Delivery, goes to the sheriff, to return a general panel of jurors, and that precept is returned into court on the first day of the assizes with the panel, and from the names contained in that panel all the jurors, both in the civil and criminal side of the court, are taken; and as the criminal court always possesses the powers of courts of Oyer and Terminer and General Gaol Delivery, the jury process awarded in that court is entered on the roll, "therefore let a jury thereupon immediately come."

The judge sitting at Oyer and Terminer or Gaol Delivery, has power, after issue joined, to direct a jury to come for the trial of the prisoner, and the usual *venire facias*, "therefore let a jury thereupon immediately come," is sufficient, because under the Jury Act, Con. Stat. U. C., c. 31, there has been a previous precept issued for the return of jurors to that court; and justices of both these courts have the same powers by the Act. (s)

Where a court is held under a special commission, begun in one year and finished in the next, and no new precept has issued to the sheriff for the return of jurors, it is not necessary that the jury should be empanelled from the jury-book for the latter year. (t) This might be requisite if the Act

(r) *Reg. v. Kennedy*, 28 U. C. Q. B. 331, per *Draper*, C. J.

(s) *Whelan v. Reg.*, 28 U. C. Q. B. 84-5, per *Richards*, C. J.

(t) *Mulcahy v. Reg.*, L. R. 3 E. & I. App. 306.

forbade a juror, duly summoned, to serve after the delivery of the new book to the sheriff. (u).

Juries *de mediatate linguæ* are not now allowed in the case of aliens. (v)

Where a jury of this kind is allowed, a writ of *venire facias ad triandum* must be issued summoning thirty-six jurors. (w)

Where the defendant has asked for a jury composed one-half of the language of the defence, six jurors speaking that language may be put into the box before calling any juror of the other language. (x)

When, to obtain six jurors speaking the language of the defence, all speaking that language have been called, the Crown is still at liberty to challenge to stand aside, and is not bound to show cause till the whole panel is exhausted. (y)

Where in a case of felony the prisoner had requested a jury *de mediatate linguæ*, and one of the jurors was discovered after verdict not to be skilled in the language of the defence, it was held that the trial was null and void. (z)

Where a prisoner has been arraigned on a charge of uttering forged paper, it is not competent for the Crown to order the trial by jury of a preliminary question raised by the prisoner's counsel, to the effect that the prisoner had been extradited from the United States on a charge of forgery, and could not therefore be legally tried here for any other offence. The question must be determined by the court. (a)

The maxim that judges shall decide questions of law and juries questions of fact, is one of those principles which lie at the foundation of our law. (b) The principle applies in criminal as well as civil cases, though, in some cases, it rests with the jury to determine a mixed question of law and fact. (c)

(u) *Mulcahy v. Reg.*, L. R. 3 E. & I. App. 316, per *Willes*, J.

(v) 32 & 33 Vic., c. 29, s. 39.

(w) *Reg. v. Vonhoff*, 10 L. C. J. 292.

(x) *Reg. v. Dougall*, 18 L. C. J. 85; but see 32 & 33 Vic., c. 30.

(y) *Reg. v. Dougall*, *supra*.

(z) *Reg. v. Chamaillard*, 18 L. C. J. 149.

(a) *Reg. v. Paxton*, 10 L. C. J. 212.

(b) *Winsor v. Reg.*, L. R. 1 Q. B. 303, per *Cockburn*, C. J.

(c) *Gray v. Reg.*, 1 E. & A. Reps. 504, per Sir J. B. Robinson, Bart.

The jury are bound to follow the direction of the court in point of law ; and where a jury attempted to persist in returning a verdict contrary to the direction of *Pollock*, C.B., he told them they were bound to return a verdict according to his direction in point of law, and explained that the facts only were within their province and the law in his ; and although he did not infringe on their province, he could not permit them to invade his. (*d*)

The jury have a right, after the summing up and conclusion of the case, and after retiring to their room to deliberate, to return to open court and re-examine any of the witnesses whose evidence was not well understood by them. (*e*)

The strictness of the rules regarding juries and the conduct of trials, has been much relaxed in modern times. (*f*)

The misconduct, or irregular and improper conduct of juries, will only have the effect of vitiating their verdict, when it is such that the result of the trial has been influenced by it, or when there is any sufficient and reasonable ground to believe that such influence or effect has been produced by it. (*g*)

There is a substantial distinction in regard to misconduct of the jury, whether the irregularity took place before or after the jury are charged by the judge. The indulgence in the way of separating, or otherwise, is much restricted after the charge. (*h*)

The fact that one of the jury, on a trial for felony, during a recess which took place in the progress of the trial, not being in charge of any officer or other person, entered a public house, and mentioned the subject of the trial to A., and had some slight conversation with other parties as to it, is, in the absence of evidence that the juror or the verdict was

(*d*) *Reg. v. Robinson*, 1 U. C. L. J. N. S. 53 ; 4 F. & F. 43.

(*e*) *Reg. v. Lamere*, 8 L. C. J. 281.

(*f*) *Reg. v. Kennedy*, 2 Thomson, 207, per *Haliburton*, C. J.

(*g*) *Ibid.* 212, per *Bliss*, J.

(*h*) *Ibid.* 221, per *Wilkins*, J.

influenced by this, not sufficient to vitiate the verdict, or amount to a mis-trial. (i)

When a juror has separated from his brethren, and conversed with others on the subject of the cause in a way calculated to influence him in forming an opinion upon it, it amounts to a mis-trial, let the consequences be what they may ; but if the juror is not influenced by anything which occurred in consequence of the separation, there is no mis-trial. (j)

In all criminal trials less than felony, the jury may, in the discretion of the court, and under its direction as to conditions, mode, and time, be allowed to separate during the progress of the trial. (k) But in felony such latitude is not allowed, and if in such case the jury be permitted to separate, there is a mis-trial ; and the court may direct that the party be tried as if no trial had been had. (l)

The Crown, as well as the prisoner, has a right to set aside a verdict vitiated by the jury's misconduct. (m)

There is no authority for ordering that a jury have refreshments during the period of their deliberation. (n)

As to discharging juries, there would seem to be no difference between misdemeanors and felonies. In both, the principles on which trial by jury is to be conducted are the same. (o)

If a juryman has merely fainted, because the court-room is hot and close, it would be proper to wait a short time, and then proceed ; but if he is taken so ill that there is no likelihood of his continuing to discharge his duty without danger to his life, the jury must be discharged. (p)

Where the record of a conviction for felony showed that, on the trial of an indictment, the jury being unable to agree,

(i) *Reg. v. Kennedy*, 2 Thomson, 203.

(j) *Ibid.* 206-7, per *Haliburton*, C. J.

(k) 32 & 33 Vic., c. 29, s. 57.

(l) *Reg. v. Derrick*, 23 L. C. J. 239.

(m) *Reg. v. Kennedy*, 2 Thomson, 213, per *Bliss*, J.

(n) *Winsor v. Reg.*, L. R. 1 Q. B. 308, per *Cockburn*, C. J.

(o) *Ibid.* 307, per *Cockburn*, C. J.

(p) *Ibid.* 315, per *Blackburn*, J.

the judge discharged them ; that the prisoner was given in charge of another jury at the next assizes, and a verdict of guilty returned, and judgment and sentence passed ; on writ of error, it was held that the judge had a discretion to discharge the jury, which a court of error could not review ; that the discharge of the first jury without a verdict was not equivalent to an acquittal ; that a second jury process might issue, and that there was no error on the record. (*q*)

And it may be stated generally that when the discharge of a jury is warranted by the rules of law, it does not operate as an acquittal, or bar another trial ; but if the jury are wrongfully discharged, the prisoner cannot be put a second time on trial. (*r*)

The illness of a juror, or the illness of a prisoner, has been held sufficient ground for discharging the jury. (*s*)

A jury sworn and charged, even in case of felony, may be discharged, without verdict, in case of death or illness of one of the jury, or their being unable to agree, or at the desire of the accused, with the consent of the prosecution. (*t*)

The jury cannot be discharged at the instance of the prosecutor in order to obtain evidence, of which, at the trial, there appears to be a failure. But it would seem that this is not a rule of positive law, and that there are exceptions to it ; and where a witness is kept away by the prisoner, and by collusion between him and the prisoner, is tampered with, the rule should be relaxed, and the judge permitted to discharge the jury.

Where a jury are discharged in consequence of their not agreeing, it is not necessary to wait ; and, on the contrary, the judge should not wait until the jury are exposed to the dangers which arise from exhaustion or prostrated strength of body and mind, or until there is a chance of conscience

(*q*) *Winsor v. Reg.*, L. R. 1 Q. B. 390 (Ex. Chr.)

(*r*) *Ibid.*

(*s*) *Ibid.* 305, per Cockburn, C. J.

(*t*) *Reg. v. Charlesworth*, 9 U. C. L. J. 53 ; 1 B. & S. 460.

and conviction being sacrificed for personal convenience, and to be relieved from suffering. (u)

The defendant was put on trial for a misdemeanor. At the trial a witness, called on behalf of the Crown, claimed his privilege not to give evidence on the ground that he would thereby criminate himself. The judge who presided at the trial refused to allow him the privilege; but the witness, still refusing to answer, was committed to prison for contempt of court, and a conviction of the defendant being under these circumstances impossible, the jury, at the request of the counsel for the prosecution, and against the protest of the counsel for the defendant, were discharged without giving any verdict. It was held that the defendant ought not to be allowed to put a plea upon the record stating the above facts, but that they ought to appear as an entry on the record. An entry was made upon the record accordingly; when it was further held that whether or not the judge had power to discharge the jury, what took place did not amount to a verdict of acquittal, nor was the prisoner entitled to plead *autrefois acquit* in respect thereof, and that the defendant was not entitled to judgment *quod eat sine die*, or to the interference of the court to prevent the issuing of a fresh process. (v)

The old doctrine, that if the jury could not agree, it was the duty of the judge to carry them from town to town in a cart, has been exploded in modern times. It is certainly not now the practice. (w)

In criminal cases, not capital, where the verdict is so inconsistent and repugnant, or so ambiguous and uncertain, that no judgment can be safely pronounced upon it, a *venire de novo* may be awarded. (x)

Where, on an indictment for murder, the jury returned a verdict, in writing, in the following words: "Guilty of

(u) *Reg. v. Charlesworth*, 9 U. C. L. J. 48.

(v) *Ibid. supra.*

(w) *Winsor v. Reg.*, L. R. 1 Q. B. 305, per Cockburn, C. J.; *ibid.* 320-1, per Mellor, J.

(x) *Reg. v. Healey*, 2 Thomson, 332-3, per Bliss, J.

murder, with a recommendation to mercy, as there was no evidence to show malice aforethought and premeditation," it was held that the verdict was too ambiguous and uncertain to allow the court to pronounce any judgment upon it. (y) A recommendation to mercy is no part of the verdict. (z)

If it were shown that, upon the jury delivering their verdict in open court, anything was openly said by them which could give the court to understand that they were not openly assenting to that verdict, and, nevertheless, by some error or misapprehension, it was received as their unanimous verdict, the court could and ought to interfere on such ground and grant a new trial, when such a course was authorized by our criminal practice. (a)

A jury may correct their verdict, or any of them may withhold assent and express dissent therefrom, at any time before it is finally entered and confirmed. (b)

It is irregular for counsel to question the jury directly, and not through the court, as to the grounds of their verdict. (c)

It would appear that the right of a jury to find a general verdict in a criminal case, and to decline to find the facts specially, cannot be questioned, especially when the verdict is one of acquittal. (d)

It is doubtful whether a verdict can be received and recorded on a Sunday. (e)

The Con. Stats. U. C., c. 113 (20 Vic., c. 61), has been repealed except sections 5, 16 and 17. By the 32 & 33 Vic., c. 29, s. 80, no appeal lies to the Court of Appeal in any criminal case where the conviction has been affirmed by either of the superior courts of common law, on any question of law reserved for the opinion of such court. But now by the Supreme Court Act, an appeal lies to the court thereby

(y) *Reg. v. Healey*, 2 Thomson, 331.

(z) See *Reg. v. Trebilcock*, 4 U. C. L. J. 168; Dears. & B. 453.

(a) *Reg. v. Fellowes*, 19 U. C. Q. B. 50, per *Robinson*, C. J.; and see *Reg. v. Ford*, 3 U. C. C. P. 217-18, per *Macaulay*, C. J.

(b) *Reg. v. Ford*, *supra*, 217, per *Macaulay*, C. J.

(c) *Ibid.*

(d) *Reg. v. Spence*, 12 U. C. Q. B. 519.

(e) *Winsor v. Reg.*, L. R. 1 Q. B. 308, 317, 322.

constituted, where the decision of the court of final resort in the province is not unanimous. (*f*)

It has been held in England that no case can be stated for the opinion of the court for Crown cases reserved, except upon some question of law arising upon the trial. Where therefore, the prisoner had pleaded guilty, and the question asked was whether the prisoner's act, as described in the depositions, supported the indictment, the court held that they had no jurisdiction to consider the case. (*g*)

When a case is reserved, under the Con. Stats. U. C., c. 112, the court may arrest the judgment, with a view to a new indictment being preferred, or for other purposes. (*h*)

In *Reg. v. McEvoy*, (*i*) the court, under the facts shown, considered they might either enter an arrest of judgment under the statute, or direct judgment to be given as for a misdemeanor at common law; but the latter course was adopted because it was doubted whether the judgment could properly be arrested, where the indictment, though framed imperfectly, as for an offence against a statute, does contain a sufficient charge of an offence at common law.

It would seem that the objections, on a motion to arrest the judgment, are confined to the points reserved under the statute. (*j*)

Where, on an appeal from a conviction affirmed at the sessions, it appeared that the point in question was purely one of law, and there could be no object in sending the case down for a new trial, the judgment was arrested. (*k*)

The court may, in certain cases, stay the entry of judgment until a new indictment is preferred, but in such case, the indictment must be removed by *certiorari*. (*l*)

(*f*) *Reg. v. Amer*, 2 S. C. R. 593.

(*g*) *Reg. v. Clark*, L. R. 1 C. C. R. 54; 36 L. J. (M. C.) 16.

(*h*) *Reg. v. Rose*, 1 U.C.L.J. 145; *Reg. v. Spence*, 11 U.C.Q.B. 31; *Reg. v. Orr*, 12 U. C. Q. B. 57.

(*i*) 20 U. C. Q. B. 344.

(*j*) *Reg. v. Fennety*, 3 Allen, 132.

(*k*) *Reg. v. Rubidge*, 25 U. C. Q. B. 299.

(*l*) *Reg. v. Spence*, 12 U. C. Q. B. 519.

In criminal matters, foreign law should not be brought before the court. (m) American authorities, though entitled to respect, will not be received as binding in our courts. (n) Nor are English decisions absolutely binding in this country. (o)

If, after a verdict of guilty of felony, and when the judge is about to pass sentence, objections are made by the prisoner's counsel in arrest of judgment, but overruled by the judge trying the cause, the court in *banc* has authority to inquire into the validity of these objections, though the record does not state that the prisoner's counsel moved in arrest of judgment. The presence of the prisoner at the argument may be waived by consent of parties. (p)

The superior court will adjudicate on a reserved case of misdemeanor in the absence of the defendant, who has fled beyond the jurisdiction of the court. (p)

Where a man charged with felony is being tried, whatever may have been his position in life, he must take his place in the dock; but a misdemeanant, if on bail, is not obliged to do so. (r)

In criminal cases, it is always entirely in the discretion of the court to allow a view or not. It is therefore no irregularity to allow the jury to have a view of premises where an alleged offence has been committed, after the judge has summed up the case. (s)

The court ought to take such precautions as may be necessary to prevent the jury from improperly receiving evidence out of court. Where, at proceedings on a view, evidence was received in the absence of the judge, the prisoners, and their counsel, the court for Crown cases reserved held that it is for the court before which the trial takes place, to ascertain whether such irregularity has taken place, and that they could

(m) *Notman v. Reg.*, 13 L. C. J. 259, per *Duval*, C. J.

(n) *Roberts v. Patillo*, 1 James, 367; *Reg. v. Creamer*, 10 L. C. R. 404.

(o) *Reg. v. Roy*, 11 L. C. J. 92.

(p) *Reg. v. Kennedy*, 2 Thomson, 204.

(q) *Reg. v. Fraser*, 14 L. C. J. 245.

(r) *Ex parte Blossom*, 10 L. C. J. 69, per *Meredith*, J.

(s) *Reg. v. Martin*, L. R. 1 C. C. R. 378.

not reverse the conviction on the ground of a mere statement of what the judge was informed; and it is doubtful whether, if such irregularity had occurred, this court would have jurisdiction to order a *venire do novo*, as for a mis-trial; or whether, if the facts were thus tried, and found to be as alleged, they ought to be entered on the record, so as to give an opportunity of taking advantage of the defect by writ of error, or whether the question could be properly raised by a case stated for this court. (t)

The judge has a discretion to adjourn the trial when the counsel engaged in it becomes so ill as to be unable to proceed. One of the prisoner's counsel at the trial, whilst he was addressing the jury at the close of the case, was suddenly seized with a fit, and incapacitated from proceeding further. No adjournment, however, was applied for; but the other, who was the senior counsel, continued the address to the jury on the prisoner's behalf, without raising any objection that he was placed at a disadvantage by his colleague's disability. It did not, moreover, appear that the prisoner had been prejudiced by the absence of the counsel alluded to, and it was held no ground for a new trial; but in such case, if a postponement had been asked in consequence of the illness, it would have been in the discretion of the judge to have granted it or not, and to have adjourned it for an hour or two, or to another day, or for several days, or until the following court, as might have been thought reasonable. (u)

Objections which it is intended to insist on afterwards, must be distinctly raised at the trial; and as the judge presiding is authorized by the Con. Stats. U. C., c. 112, to reserve any question of law for the opinion of the court, it is the more necessary that his attention should be drawn to every matter of law which is relied on for the prisoner, whether by way of suggestion on the defence, or of exception to the judge's ruling, or direction at the trial. (v)

(t) *Reg. v. Martin*, L. R. 1 C. C. R. 378.

(u) *Reg. v. Fick*, 16 U. C. C. P. 379.

(v) *Reg. v. Craig*, 7 U. C. C. P. 241, per *Draper*, C. J.

The objections should also be noted by the judge, for the court cannot notice grounds of objections taken in rules unless they appear in the judge's notes ; and it is the duty of counsel on moving, to ascertain whether the objections they rely on were noted by the judge who presided at the trial. If they do not appear to be noted, a reference should be made to the judge to have the notes amended before they are made the grounds of a motion. (*w*)

There is nothing to prevent the judge, on a criminal trial, having the notes of the evidence taken in writing by another person. (*x*)

The 32 & 33 Vic., c. 29, s. 32, provides that every objection to any indictment, for any defect apparent on the face thereof, must be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded, and not afterwards. The object of this statute was to prevent waste of time and labor in criminal trials, and to compel a legal defence to be resorted to at the earliest possible stage. The court, therefore, will not arrest judgment after verdict, or reverse judgment in error, for any defect apparent on the face of the indictment, which could have been taken advantage of under this clause. (*y*)

The defendant is not in all cases of acquittal entitled to a copy of the indictment laid against him ; and where the charge was for obtaining goods by false pretences, copies of the indictment and papers were refused. (*z*)

A copy of an indictment for high treason may be obtained by consent of the Attorney General. (*a*) And the same rule seems to apply in felony ; and his decision is not subject to review. (*b*) At any rate, unless the indictment were removed by *certiorari*, the Court of Queen's Bench would not

(*w*) *Reg. v. Des Jardins C. Co.*, 27 U.C.Q.B. 380, per *Morrison*, J. ; see also *Cousins v. Merrill*, 16 U. C. C. P. 120.

(*x*) *Duval dit Barbinais, v. Reg.*, 14 L. C. R. 75, per *Meredith*, J.

(*y*) *Reg. v. Mason*, 32 U. C. Q. B. 246.

(*z*) *Reg. v. Senecal*, 8 L. C. J. 286.

(*a*) *Rex v. McDonel*, Taylor, 299.

(*b*) *Reg. v. Joy*, 24 U. C. C. P. 78.

have jurisdiction. (c) The judge has power on acquittal to order the delivery of a copy. (d)

The 32 & 33 Vic., c. 29, s. 26, provides that on an indictment for any offence laying a previous conviction, the offender shall in the first place be arraigned upon, so much only of the indictment as charges the subsequent offence, and if he pleads not guilty, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only.

If, when found guilty of the subsequent offence, the prisoner denies that he was previously convicted, or stands mute of malice, or will not answer whether he is guilty or not guilty, the jury should then be charged to inquire concerning such previous conviction. (e)

Where an indictment contains one count for larceny, and allegations in the nature of counts for previous convictions for misdemeanors, and the prisoner, being arraigned on the whole indictment, pleads not guilty, but is not tried till a subsequent assize, when he is given in charge on the count for larceny only, this does not amount to an error, for he was properly given in charge to the jury, and, having been arraigned and his plea entered at a previous assize, could not be prejudiced by any mistake in his arraignment. (f)

Under the English Acts, 5 Geo. IV., c. 84, s. 24, and 8 & 9 Vic., c. 113, s. 1, which are in substance the same as our 32 & 33 Vic., c. 29, s. 26, omitting the proof of the identity contained in the latter Act, it was held that the certificate of a previous conviction, required by these Acts, is sufficient, if it purports to be signed by an officer having the custody of the records, although that officer is therein described as the deputy clerk of the peace of a borough. (g)

The 32 & 33 Vic., c. 29, s. 45, provides that all persons tried for any indictable offence shall be admitted, after the

(c) *Reg. v. Joy*, 24 U. C. C. P. 78.

(d) *Heaney v. Lynn*, Ber. (N. B.) 27.

(e) See *Reg. v. Harley*, 8 L. C. J. 280.

(f) *Reg. v. Mason*, 32 U. C. Q. B. 246.

(g) *Reg. v. Parsons*, L. R. 1 C. C. R. 24 ; 35 L. J. (M. C.) 167.

close of the case for the prosecution, to make full answer and defence thereto, by counsel learned in the law.

Two counsel only can be heard on behalf of prisoners indicted for criminal offences, and persons tried for felonies may make their full defence by two counsel, and no more, before a jury wholly composed of persons skilled in the language of the defence. (*h*)

After two counsel had addressed the jury on behalf of the prisoner, a third rose to do so, but was stopped by the court. (*i*)

Two parties accused of the same offence have been held in Quebec not to be entitled to a separate defence. (*j*) But circumstances might exist which would render its allowance necessary for the attainment of justice.

At the close of the case for the prosecution of three prisoners, defended by separate counsel, one was acquitted, and was called as a witness on behalf of one of the two remaining. This witness criminated the other prisoner; and it was held that the counsel of the prisoner criminated had a right to cross-examine and address the jury on the evidence so given; and that, as this right had been refused, the conviction of the prisoner must be quashed, although the court had offered to put the questions suggested by his counsel. (*k*)

It has been held that, in cases of public prosecutions for felony instituted by the Crown, the law officers of the Crown, and those who represent them, were in strictness entitled to the reply, though no evidence was produced on the part of the prisoner. (*l*) But in Ontario, a counsel for the Crown, not being himself the Attorney or Solicitor General, had no right to reply in an ordinary prosecution for crime, where no witnesses were called for the defence. (*m*)

(*h*) *Reg. v. D'Aoust*, 9 L. C. J. 85.

(*i*) *Ibid.*

(*j*) *Reg. v. McConohy*, 5 *Revue Leg.* 746.

(*k*) *Reg. v. Luck*, 1 U. C. L. J. 78; 3 F. & F. 483; see also *Reg. v. Coyle*, 2 U. C. L. J. 19.

(*l*) *Reg. v. Quatre Pattes*, 1 L. C. R. 317.

(*m*) *Reg. v. McLellan*, 9 U. C. L. J. 75.

Now, however, the right of reply shall always be allowed to the Attorney or Solicitor General, or to any Queen's counsel, acting on behalf of the Crown. (*n*)

A clerk of the Crown in Quebec, being a Queen's counsel, has a right to be heard in a criminal case, on behalf of the Crown, notwithstanding Con. Stats. L. C., c. 77, s. 75; and the duties and powers of clerks of the Crown not being defined in their commissions, nor by statute, the court will look to the English law, and the powers and duties of the master of the Crown office there, as a guide in deciding on the duties and powers of clerks of the Crown in Quebec. (*o*)

Crown prosecutions differ from ordinary civil suits; for, if the Queen be prosecutor, there can be no *non pros.*, or non-suit or demurrer to evidence. The prosecutor may be a witness but not the defendant, and if the latter obtain judgment, he is not entitled to costs. (*p*)

Error.—A writ of error lies for every substantial defect appearing on the face of the record, for which the indictment might have been quashed, or which would have been fatal on demurrer, or in arrest of judgment. A writ of error is, therefore, the proper remedy for certain substantial defects appearing on the face of the record. (*q*)

A court of error is confined to errors appearing on the face of the record, and cannot exercise an appellate jurisdiction, and inquire into the facts of the case, (*r*) and affidavits for this purpose are inadmissible. Nor can the judge's notes be looked to, as they form no part of the record. (*s*)

Unless there be manifest error on the face of the record, it is the duty of the court to affirm the judgment. (*t*)

The matter is to be decided as a strictly legal proposition, and no consideration of the effect which the decision may

(*n*) 32 & 33 Vic., c. 29, s. 45, subs. 2.

(*o*) *Reg. v. Carter*, 15 L. C. R. 291.

(*p*) *Reg. v. Pattee*, 5 U. C. P. R. 295; 7 C. L. J. N. S. 124.

(*q*) *Duval dit Barbinas v. Reg.*, 14 L. C. R. 71.

(*r*) *Duval dit Barbinas v. Reg.*, 14 L. C. R. 79, per *Duval*, C. J.; *ibid.* 75, per *Meredith*, J.; *Dougall v. Reg.*, 22 L. C. J. 133.

(*s*) *Dougall v. Reg.*, 22 L. C. J. 133.

(*t*) *Whelan v. Reg.*, 28 U. C. Q. B. 139, per *Draper*, C. J.

have upon the parties will be permitted to be taken into consideration, to mould the judgment of the court by the exercise of discretion. (u)

No writ of error will be allowed in any criminal case, unless founded on some question of law which could not have been reserved, or which the judge presiding at the trial refused to reserve for the consideration of the court having jurisdiction in such cases, or unless it be a point which could not have been reserved at the trial. (v)

Whether the police court is a court of justice within 32 & 33 Vic., c. 21, s. 18, or not, is a question of law which may be reserved by the judge at the trial, under Con. Stat. U. C., c. 112, s. 1; and where it does not appear, upon the record in error, that the judge refused to reserve such question, it cannot be considered upon a writ of error. (w)

There is no case in which the discretion of a judge, exercised on a mixed question of law and fact, has been reviewed in error. (x)

It would seem that, when a judge has a discretion to do or omit to do a particular thing, his judgment, in the exercise of that discretion, is not subject to revision in error. Rules of practice or procedure, on a criminal trial, rest pretty much in the discretion of the judge, and cannot be made the foundation of a writ of error. (y)

The right of postponing the hearing and trial of the cause, urged by a prisoner as a ground of challenge, is discretionary with the judge, and the question is only one of practice or procedure, and, therefore, not examinable in error. (z)

A writ of error will lie where a *venire facias* for the summoning of jurors is addressed to improper parties. (a) So a

(u) *Whelan v. Reg.* U. C. Q. B. 94.

(v) 32 & 33 Vic., c. 29, s. 80; *Reg. v. Mason*, 32 U. C. Q. B. 246.

(w) *Reg. v. Mason*, *supra*.

(x) *Winsor v. Reg.*, L. R. 1 Q. B. 316.

(y) *Ibid. Whelan v. Reg.*, 28 U. C. Q. B. 1, *et seq.*

(z) *Ibid.* 133.

(a) *Reg. v. Kennedy*, 26 U. C. Q. B. 332, per *Draper*, C. J.; *Crane v. Holland*, Cro. El. 138; see also *Willoughby v. Egerton*, Cro. El. 853.

challenge to the array overruled would be a ground of error, if the party did not afterwards challenge to the polls. (b) The improper granting or refusing of a challenge is alike the foundation of a writ of error. (c)

The proceedings on a rule for contempt, on the Crown side of the Court of Queen's Bench, do not constitute a criminal case within Con. Stats. L. C., c. 77, s. 56, and, as a writ of error does not lie, at common law, on an adjudication for contempt, for it is a judgment in immediate execution not examinable in any other tribunal, therefore a writ of error does not lie with respect to judgment rendered on such a rule. (d)

For an improper award of a *venire de novo*, a writ of error lies for the subject. (e)

The proper proceeding to reverse a judgment of the court of Quarter Sessions is by writ of error, not by *habeas corpus* and *certiorari*, as in the case of summary convictions. (f)

No writ of error lies upon a summary conviction, and it only lies on judgments in courts of record acting according to the course of the common law. (g)

A proceeding by writ of error is the more formal method of getting rid of an erroneous judgment, but, as the writ lies for error *in the judgment*, where the judgment is void perhaps it would not be the proper course. (h)

After judgment, the only remedy is by writ of error. But error only lies on a final judgment. (i)

The rule prevailing in civil cases, that when the error is in fact and not in law, the proceedings may be taken in the same court, but when the error is in the judgment itself, error must be in another and superior court, extends also to criminal cases.

(b) *Winsor v. Reg.*, L. R. 1 Q. B. 61, per *Wilson*, J.

(c) *Ibid.* 93.

(d) *Ramsay v. Reg.*, 11 L. C. J. 158.

(e) *Reg. v. Charleworth*, 9 U. C. L. J. 51, per *Crompton*, J.

(f) *Reg. v. Powell*, 21 U. C. Q. B. 215.

(g) *Ramsay v. Reg.*, 11 L. C. J. 166.

(h) *Reg. v. Sullivan*, 15 U. C. Q. B. 435, per *Wilson*, J.; *Reg. v. Smith* 10 U. C. Q. B. 99.

(i) *Ex parte Blossom*, 10 L. C. J. 42, per *Badgley*, J.

Therefore, the Court of Queen's Bench for Ontario has no authority, in criminal cases, either at common law or by statute, to issue its own writ for the review of its own judgment upon error in law, returnable to a superior court. But the Court of Appeal for Ontario has full power to issue a writ of error in criminal as well as civil cases, and, when the error is in the judgment in the Court of Queen's Bench, the writ of error should be issued out of the Court of Appeal. The writ may be, as nearly as possible, in the form of a writ of appeal given by the orders of the court, as published in 1850. (j)

A writ of error cannot be granted without the fiat of the Attorney General. (k)

If, in an information of *quo warranto*, the Attorney General have granted his fiat that a writ of error may issue, the court will not interfere, the first being conclusive. (l)

The Attorney General (or, in his absence, the Solicitor General) alone can authorize the issue of a writ of error, and he cannot delegate that power to another. Where, therefore, a writ of error was issued and signed by T. K. Ramsay, acting for and in the name of Her Majesty's Attorney General, and not by the Attorney General himself, it was held illegal and void. (m)

On error, from the Court of Queen's Bench for Ontario to the Court of Appeal, the party is at liberty, in the latter court to assign new errors, in addition to those laid in the Court of Queen's Bench. (n)

It has been already shown that a court of error can only consider matters appearing on the face of the record. It follows, therefore, that matters which cannot be raised upon the record are not examinable in error. The pleadings, the proper continuance of the suit and process, the finding of the jury upon an issue in fact, if any such had been joined, and

(j) *Whelan v. Reg.*, 28 U. C. Q. B. 100.

(k) *Notman v. Reg.*, 13 L. C. J. 255 ; see also *Whelan v. Reg.*, *supra*.

(l) *Reg. v. Clarke*, 5 U. C. L. J. 263.

(m) *Dunlop v. Reg.*, 11 L. C. J. 271.

(n) See *Whelan v. Reg.*, 28 U.C.Q.B. 110 ; *Reg. v. Mason*, 32 U.C.Q.B. 246.

the judgment, are the only matters which can be raised upon the record with a view to error. As a bill of exceptions does not lie in a criminal case, there is no mode of causing the rulings of the judge, upon questions of evidence, or his directions to the jury, to be made part of the record, and consequently such rulings or directions cannot be reviewed in error. (*o*)

It need not appear on the face of the record that the jury, when they retired at the judge's charge, were in the custody of sworn constables. An objection on this ground cannot, therefore, be reviewed in error. Though the improper allowance or disallowance of a challenge is ground of error, yet, strictly speaking, there ought to be an answer in law or in fact to the challenge, and a judgment upon the issue raised.

When the proceedings on a challenge are regular, they may be made a part of the record, and may be examined in error. (*p*)

If it is desired to take the opinion of the court on the rulings of the judge, or his directions to the jury, the proper course is to apply to him to reserve a case, under the statute for the opinion of the court. (*q*)

On the trial of a prisoner who had been extradited from the United States, it was held that no question of law could be reserved and heard until after conviction. (*r*)

To purge error, it would seem that a prisoner cannot consent to the evidence of witnesses given on a former trial being read in place of a new examination of the witnesses, although the witness was present in court, and was sworn and heard his evidence read over, and the parties were told they were at liberty further to examine and cross-examine him. (*s*)

(*o*) *Duval dit Barbinais v. Reg.*, 14 L. C. R. 72-4, per *Meredith*, J.

(*p*) *Ibid.* 74-5, per *Meredith*, J.

(*q*) *Ibid.* 74, per *Meredith*, J.

(*r*) *Reg. v. Paxton*, 2 L. C. L. J. 162.

(*s*) *Reg. v. Bertrand*, L. R. 1 P. C. App. 520; but see *Rex v. Streek*, 2 C. & P. 413; *Rex v. Foster*, 7 C. & P. 495; *Whelan v. Reg.*, 28 U. C. Q. B. 52, per *A. Wilson*, J.

A prisoner can consent to nothing manifestly irregular; as that his wife should be examined as a witness, or that the witnesses should be examined without being sworn, or that admissions made by his attorney to the opposite attorney out of court should be received as evidence in the cause. (w) He may, however, consent to withdraw or release his challenge altogether, or to accept a juror, on his challenge being overruled. He might consent too to secondary evidence being given, and, it would seem, although no notice to produce had been served. So he might consent to withdraw a plea in abatement, and he may withdraw his plea of not guilty, and plead guilty. He might also consent to the jury taking with them plans or writings not under seal, which were given in evidence. (x)

A *concilium* has been granted for the argument of errors in the Court of Queen's Bench. (y)

It would seem that the court may direct Crown cases to stand on the new trial paper for argument with ordinary suits between party and party. (z)

If a juror against whom there is a good cause of challenge is sworn, and sits on the jury, there would be a mis-trial, and the proceedings would amount to error, and on writ of error brought, the court would direct a *venire de novo*, if the party was not allowed to challenge for cause, and was directed to challenge peremptorily. (a)

A mis-trial vitiates and annuls the verdict *in toto*, and the only judgment is a *venire de novo*, because the prisoner was never, in contemplation of law, in any jeopardy on his first trial. (b)

The distinction between a *venire de novo* and a new trial is that the former must be granted in respect of matters appear-

(w) *Whelan v. Reg.* 128 U. C. Q. B. 52.

(x) *Ibid.* 53-4, per A. Wilson, J.

(y) *Ibid.* 15.

(z) *Reg. v. Sinnott*, 27 U. C. Q. B. 539.

(a) *Whelan v. Reg.*, 28 U. C. Q. B. 59-91.

(b) *Ibid.* 137.

ing upon the record, but a new trial may be granted upon things out of it. (c)

It seems that a *venire de novo* can be awarded in a case of felony on a defective verdict. (d) But unless there is such an irregularity as to annul all the proceedings on the record subsequent to the award of the jury process, and render the first trial an absolute nullity, a *venire de novo* should not be granted. (e)

There is no authority that an abortive trial prevents a *venire de novo* in a case of misdemeanor; (f) and if a trial proves abortive, a *venire de novo* may be awarded in a case of felony as well as misdemeanor. (g)

A verdict on a charge of felony has been held to be a nullity, and a *venire de novo* awarded, in cases of defect of jurisdiction, in respect of time, place or person, or where the verdict is so insufficiently expressed, or so ambiguous, that a judgment could not be founded thereon. (h)

A prisoner having been tried and convicted of a capital felony, by a court of Oyer and Terminer in New South Wales, and sentence of death passed and the judgment entered upon record, an application was made to the Supreme Court, sitting in *banc*, for a rule for a *venire de novo*, on an affidavit which stated that one of the jury had informed the deponent that, pending the trial and before the verdict, the jury having adjourned to an hotel, had access to newspapers which contained a report of the trial as it proceeded, with comments thereon. The Supreme Court made the rule absolute, considering that there had been a mis-trial, and ordered an entry to be made on the record of the circumstances deposed to, that the judgment on the verdict should be vacated, and a fresh trial had; but

(c) *Reg. v. Kennerly*, 2 Thomson, 215, per Bliss, J.

(d) *Winsor v. Reg.*, L. R. 1 Q. B. 319, per Blackburn, J.; *Campbell v. Reg.*, 11 Q. B. 799; *Gray v. Reg.*, 11 Cl. & F. 427.

(e) *Reg. v. Kennedy*, *supra*, 223, per Wilkins, J.

(f) *Reg. v. Charlesworth*, 9 U. C. L. J. 51.

(g) *Winsor v. Reg.*, L. R. 1 Q. B. 319.

(h) *Reg. v. Murphy*, L. R. 2 P. C. App. 548, per Sir Wm. Erle.

on appeal to Her Majesty in council, it was held by the judicial committee that a *venire de novo* cannot be awarded after verdict upon a charge of felony, tried upon a good indictment and before a competent tribunal, where the prisoner has been given in charge to a jury in due form of law empanelled, chosen and sworn; secondly, that if a *venire de novo* could be awarded upon an application, by way of error on appeal, the proceeding in the Supreme Court was defective in form, and not warranted by the suggestion entered on the record, and therefore, thirdly, that the order for vacating the judgment and for a *venire de novo* must be set aside. (i)

The application for a *venire de novo*, in this case, was considered as an attempt to obtain a new trial by the exercise of discretion, and the principal ground of the decision was that a new trial could not be granted in a case of felony. (j)

A sentence of death need not be conformable to the English Act, 23 Geo. II., c. 17, s. 1, and a sentence in these words "that you be taken to the place of execution at such time as His Excellency the Lieutenant-Governor may direct," is sufficient. (k)

A prisoner who has been convicted of felony at the assizes may be brought up into this court to receive sentence. (l)

No warrant is required to execute a sentence of death, for, in contemplation of law, there is a record of the judgment which may be drawn up at any time. It is not necessary that a judge of a criminal court should sign any warrant or sentence directing any punishment. (m) In Nova Scotia, the warrant for execution issued from the court, and the time and place of execution were endorsed on it by the fiat of the governor. (n)

(i) *Reg. v. Murphy*, L. R. 2 P. C. App. 535.

(j) See *Reg. v. Bertrand*, L. R. 1 P. C. App. 520.

(k) *Reg. v. Kennedy*, 2 Thomson, 218.

(l) *Rex v. Kenrey*, 5 U. C. Q. B. O. S. 317.

(m) *Ovens v. Taylor*, 19 U. C. C. P. 53-4, per *Hagarty*, J.

(n) *Reg. v. Kennedy*, 2 Thomson, 213.

In general, there can be no costs allowed in Crown cases; (o) but the rule that the King neither pays nor receives costs is not universal, nor inflexible. (p)

On putting off the trial of an information for penalties at the instance of the defendant, the court will make payment of costs a condition in the same way as in civil cases. (q) Therefore when a defendant, on an indictment for perjury, puts off the trial, he must pay costs on the principle that an indulgence is granted to him, which ought not to occasion additional expense. When the King is a party costs may be receivable, when there has been default on one side or an indulgence on the other, although, upon a conviction or acquittal, none would be taxable. (r)

Where, after a rule *nisi* for a *mandamus* had been served the applicant gave notice that it would not be proceeded with but did not offer to pay the costs, the court, on application, discharged the rule with costs up to the time of the notice, and costs of said application. (s)

The court will not entertain an application for costs of an appeal against the decision of a justice, under the 20 & 21 Vic., c. 43, in the term after that in which judgment is pronounced. (t)

An attachment cannot be granted against a corporation for a non-payment of costs. (u)

Under 32 & 33 Vic., c. 31, s. 65, and 33 Vic., c. 27, the Court of Sessions has no power to award costs, on discharging an appeal for want of proper notice of appeal, for the words "shall hear and determine the matter of appeal" mean deciding it upon the merits. (v)

The 5 & 6 W. & M., c. 33, s. 3, enacts that, if the defend-

(o) *Reg. v. Justices of York*, 1 Allen, 90.

(p) *Rex v. Ives*, Draper, 456, per Macaulay, C. J.

(q) *Ibid.* 453.

(r) *Rex v. Ives*, Draper, 454, per Robinson, C. J.

(s) *Reg. v. Justices of Huron*, 31 U. C. Q. B. 335.

(t) *Budenberg and Roberts*, L. R. 2 C P. 292.

(u) *Rector of St. John v. Crawford*, 3 Allen, 266; see also *Rex v. McKenzie*, Taylor, 70.

(v) *Re Madden*, 31 U. C. Q. B. 333.

ant prosecuting a writ of *certiorari* be convicted of the offence for which he was indicted, then the court shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, head borough tithing man, churchwarden, or overseer of the poor, or any other civil officer who shall prosecute upon the account of any fact committed or done that concerned him or them, as officer or officers, to prosecute or present. The defendants were indicted before the General Quarter Sessions of the Peace for a nuisance in obstructing a highway, and they removed the indictment into the Court of Common Pleas, where they were afterwards severally convicted and judgment given against them. A motion was made for a rule absolute, ordering the costs of prosecuting the indictment to be taxed by the master, and that the said costs should be allowed to the municipality as the prosecutors of the indictment, and paid by the said defendant to the said municipality. The court refused the rule, and laid down that the regularly established practice was to issue a side-bar rule to tax the costs, and when the side-bar rule is obtained, the officers do not proceed to taxation until notice has been given to the bail.

The question who, as prosecutors, were entitled to the costs might be discussed, on a motion to set aside the side bar rule, when both parties are before the court, or it might come up on opposing a motion for an attachment, for non-payment of the costs taxed after demand made, as required by the statute. (w) The defendant, after a demand of costs, under a rule of court, by the plaintiff's attorney, paid the amount to the plaintiff. The attorney afterwards obtained a rule for an attachment for non-payment of the costs, but before the attachment issued, was informed of the payment to the plaintiff; and it was held that he was not justified in afterwards issuing an attachment for the

(w) *Reg. v. Gordon*, 8 U. C. C. P. 58.

costs of an affidavit of the demand of payment, and the costs subsequently incurred. (x)

The statutes authorizing the granting of new trials in criminal cases have been repealed, and now throughout the Dominion there is one uniform law, similar to that of England, on this point. (y) By the law of England, no new trial can be granted in the case of felony. (z) Such was also the law in Quebec, even prior to the recent statute, (a) and in Nova Scotia. (b)

When the record is on the civil side of the court, all the incidents of a civil cause attach to it. (c) Thus, when the indictment has been preferred in the Queen's Bench, or has been removed into the court by *certiorari*, and is sent down to be tried at *nisi prius*, as all the incidents of a trial at *nisi prius* attach to it, a new trial may be granted after conviction. (d) But these remarks can only hold when the charge is of misdemeanor. When the charge is of felony, no new trial can be granted, though the indictment has been removed by *certiorari*, and sent down for trial at the assizes, on a *nisi prius* record. (e)

In the case of felony or treason, if a conviction takes place against the weight of evidence, the judge passes sentence, and respites execution till application can be made to the mercy of the Crown; (f) and it would seem that this is the proper course to adopt now in Canada, in cases where formerly a new trial might be had by statute. (g)

(x) *Reg. v. Harper*, 2 Allen, 433.

(y) See 32 & 33 Vic., c. 29, s. 80.

(z) *Reg. v. Bertrand*, L. R. 1 P. C. App. 520; *Reg. v. Murphy*, L. R. 2 P. C. App. 535.

(a) *Reg. v. D'Aoust*, 10 L. C. J. 221; S. C. 9 L. C. J. 85, overruled; *Reg. v. Bruce*, 10 L. C. R. 117; *Gibb v. Tilstone*, 9 L. C. R. 244.

(b) *Reg. v. Kennedy*, 2 Thomson, 203.

(c) *Reg. v. D'Aoust*, 10 L. C. J. 223.

(d) S.C. 16 L.C.R. 494-5, per *Meredith*, J.; see also Arch. Cr. Pldg. 178.

(e) *Reg. v. Bertrand*, L. R. 1 P. C. App. 520, overruling; *Reg. v. Scaife*, 17 Q. B. 238.

(f) *Yearke and Bingleman*, 28 U. C. Q. B. 557, per *Richards*, C. J.

(g) See *Reg. v. Bertrand*, L. R. 1 P. C. App. 520-536; *Reg. v. Murphy*, L. R. 2 P. C. App. 552, per Sir *Wm. Erle*; *Reg. v. Kennedy*, 2 Thomson, 216, per *Bliss*, J.

The Court of Queen's Bench, in Lower Canada, sitting in appeal and error, as a court of error, in a criminal case, under Con. Stats. L. C., c. 77, s. 56, cannot exercise an appellate jurisdiction, but is confined, as a court of error, to errors appearing on the face of the record. (*h*)

It is the inherent prerogative right, and, in all proper cases, the duty of the Queen in council, to exercise an appellate jurisdiction in all cases, criminal as well as civil, arising in the colonies, from which an appeal lies, and where, either by the terms of a charter or statute, the power of the Crown has not been parted with. This right of appeal should be exercised with a view not only to ensure, as far as may be, the due administration of justice in an individual case, but also to preserve generally the due course of procedure. The exercise of this branch of the prerogative, in criminal cases, is to be cautiously admitted, and is to be regulated by a consideration of circumstances and consequences. Leave to appeal will only be granted under special circumstances, such as when a case raises questions of great and general importance in the administration of justice, or where the due and orderly administration of the law has been interrupted, or diverted into a new course, which might create a precedent for the future; and also when there are no other means of preventing these consequences, then it will be proper for the judicial committee to advise the allowance of such appeal. (*i*)

It is doubtful whether an appeal lies to the Queen in council, against a judgment of the Court of Queen's Bench in Quebec, quashing a writ of error against an order of the court of Queen's Bench, on the Crown side, fining and ordering an attachment against a counsel, for an alleged contempt of court. It would seem, however, that where a fine is imposed, the remedy is to petition the Crown for a

(*h*) *Duval dit Barbinas v. Reg.*, 14 L. C. R. 52.

(*i*) *Reg. v. Bertrand*, L. R. 1 P. C. App. 520; see also *Falkland Islands Co. v. Reg.*, 10 U. C. L. J. 167; 1 Moore's P. C. Cases, N. S. 299.

reference to the judicial committee, under the 3 & 4 Wm. IV., c. 41, s. 4. (*j*)

But where the court of final resort in criminal matters are not unanimous, an appeal lies to the Supreme Court of Canada, and from that court to the Privy Council. (*k*)

Special leave to appeal to the Privy Council was granted to the Attorney General of New South Wales, from an order of the Supreme Court in that colony, whereby a verdict of guilty of murder, obtained by the Crown, was set aside, and a *venire de novo* for a re-trial ordered to issue. The leave was granted on the same conditions as in *Reg. v. Bertrand*, and the proceedings in the colony were stayed, pending the appeal. (*l*)

Leave to appeal has been given from an order of the Supreme Court of Civil Justice of British Guiana, committing the publisher of a local journal to prison for six months, for an alleged contempt of court, in publishing in such journal comments on the administration of justice by that court, with liberty to the judges of the Supreme Court to object to the competency of such appeal at the hearing. (*m*)

Special leave to appeal will be granted where the question raised is one of public interest, such as the constitutional rights of a colonial Legislative Assembly. (*n*)

Permission was given to appeal, *in forma pauperis*, in a case in which the appellant was not heard in the court below, and was denied leave to appeal to Her Majesty in council, the decision being, in fact, *ex parte*. (*o*)

Leave to appeal from an order of the Supreme Court of Nova Scotia, suspending an attorney and barrister from practising in that court, has been granted, though, under the cir-

(*j*) *Re Ramsay*, L. R. 3 P. C. App. 427.

(*k*) *Reg. v. Amer*, 2 S. R. C. 593.

(*l*) *Reg. v. Murphy*, L. R. 2 P. C. App. 535.

(*m*) *Re McDermott*, L. R. 1 P. C. App. 260.

(*n*) *The Speaker of the Legislative Assembly of Victoria v. Glass*, L. R. 3 P. C. App. 560.

(*o*) *George v. Reg.*, L. R. 1 P. C. App. 389.

cumstances, it was incumbent on the appellant to apply to Her Majesty, in the first instance, to admit the appeal. On a suggestion of the injury and delay which an application to Her Majesty would create, the appeal was allowed by the Privy Council. (*p*)

Special leave to appeal was granted under the circumstances shown in *Reg. v. Murphy*. (*q*)

Special leave to appeal from a conviction of a colonial court for a misdemeanor having been given, subject to the question of the jurisdiction of Her Majesty to admit such an appeal, and it appearing at the opening of the appeal that, since such qualified leave had been granted, the prisoner had obtained a free pardon and been discharged from prison, the judicial committee declined to enter upon the merits of the case, or to pronounce an opinion upon the legal objections to the conviction, the prisoner having obtained the substantial benefit of a free pardon. They accordingly dismissed the appeal. (*r*)

It seems the Privy Council would entertain an appeal from a provincial Court of Appeal, without express leave of such court. (*s*)

No appeal to England is expressly given by our statutes, in criminal cases, but several appeals to the Privy Council have been made in the Dominion.

The Crown may issue *fi. fas.* for the sale of goods and lands in order to satisfy a fine imposed, and may include both classes of property in the same writ; and may make it returnable before the end of twelve months, the Crown not being bound by the 43 Edw. III., c. 1. (*t*) But the court may, at any time, interfere, as exercising the power of a Court of Exchequer, to restrain undue harshness or haste in the execution thereof. (*u*)

(*p*) *Re Wallace*, L. R. 1 P. C. App. 292-3.

(*q*) L. R. 2 P. C. App. 538.

(*r*) *Levien v. Reg.*, L. R. 1 P. C. App. 536.

(*s*) *Whelan v. Reg.*, 28 U.C.Q.B. 186, per *Draper*, C. J. ; *Naiker v. Yettia*, L. R. 1 P. C. App. 1 ; *Ko Khine v. Snadden*, L. R. 2 P. C. App. 50.

(*t*) *Reg. v. Desjardins Canal Co.*, 29 U. C. Q. B. 165.

(*u*) *Ibid.*

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